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No. 01-___

IN THE

Supreme Court of the United States

OMAHA PUBLIC POWER DISTRICT,
Petitioner,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether certiorari should be granted to review the Federal Circuit's articulation and application of the "sovereign acts" and "unmistakability" doctrines.

2. Whether the wholly retroactive assessment at issue in this case, which requires private parties to pay $2.25 billion based on transactions dating back more than forty years, and which the government adopted with the avowed purpose of increasing the sales price of a commercial enterprise it was simultaneously divesting, violates the Takings or Due Process Clauses.

RULE 29.6 STATEMENT

Omaha Public Power District is a political subdivision of the State of Nebraska. It has no subsidiaries or affiliates that have issued shares to the public.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Omaha Public Power District respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the panel of the court of appeals in this case (Pet. App. 1a-16a) is reported at 271 F.3d 1357.[1] The panel opinion was entered under the constraints of a Federal Circuit *en banc* opinion (Pet. App. 40a-91a), which is reported at 271 F.3d 1327. The opinion of the Court of Federal Claims dismissing Petitioner's complaint (Pet. App. 17a-39a) is reported at 46 Fed. Cl. 29 (1999).

RELEVANT STATUTORY PROVISIONS

The Appendix (at 122a-141a) reproduces relevant provisions of Titles IX, X, and XI of the Energy Policy Act of 1992, Pub. L. No. 102-486 (Oct. 24, 1992) ("EPACT").

JURISDICTION

The Federal Circuit entered its opinion and order on November 20, 2001. On February 12, 2002, the Chief Justice extended the time to file this Petition to and including March 20, 2002. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

STATEMENT

I. The Enrichment Contracts

The Energy Policy Act of 1992 ("EPACT") imposes retroactively more than $2.25 billion in assessments on utilities that purchased uranium enrichment services from the federal

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[1] The opinion addressed three separately docketed cases: *Maine Yankee Atomic Power Co.* v. *United States*, No. 99-5156; *Sacramento Mun. Util. Dist.* v. *United States*, No. 99-5158; and *Omaha Public Power Dist.* v. *United States*, No. 99-5160.

government prior to October 24, 1992.[2] Court of Appeals Joint Appendix ("J.A.") 2-3; 42 U.S.C. 2297g-1(c)-(e). The government built and began operating its enrichment facilities in 1945. J.A. 136. Until 1969, the enrichment plants were dedicated almost exclusively to national defense programs. *Id.* During that time period, the buildings, equipment, and property became fully contaminated with radioactive and other hazardous materials. *Id.* 137. The government was well aware of this contamination and of its eventual obligation to decontaminate and decommission the plants. *Id.* 139-40.

Congress amended the Atomic Energy Act of 1954 ("AEA") to enable the government to sell enrichment services directly to private parties starting in 1969. J.A. 137-38. As a result, although the government continued to support national defense requirements, the Atomic Energy Commission ("AEC") and its successor agencies including the Department of Energy ("DOE") began to sell enrichment services to commercial customers, such as Petitioner Omaha Public Power District ("Petitioner" or "OPPD").

Pursuant to Section 161(v) of the AEA, the government was required to publish written criteria setting forth the key terms of enrichment sales and to submit the criteria and any changes thereto for congressional approval. Under the contracts and the regulations governing the program, the government maintained complete control over all aspects of the operation of the enrichment facilities, the enrichment process, and the disposal of waste from the enrichment activities. J.A. 137. The government owned and was responsible for all uranium in its possession. Although customers were required to furnish unenriched uranium ("feed material"), the government took title to the furnished material. J.A. 68; Supplemental Appendix in Fed. Cir.

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[2] Facts concerning the government's uranium enrichment program and EPACT are also set forth in the Petitions for Certiorari, now pending before this Court, filed by three similarly affected utilities, and are incorporated herein by reference. *See* No. 01-1020, *Sacramento Mun. Util. Dist.* v. *United States*; No. 01-1155, *Maine Yankee Atomic Power Co.* v. *United States*; No. 01-___, *Commonwealth Edison Co.* v. *United States* (filed contemporaneously with this Petition).

No. 0050-69, *Commonwealth Edison* v. *United States* ("Com. Ed. A.S.A.") 2, ¶ 1. The government advised that it would not "necessarily use the specific feed material furnished by the customer" to produce the enriched uranium subsequently delivered" but would commingle the uranium in common stockpiles to be used at the government's discretion. *Id.* ¶ 5(a). The contracts further specified that the government would retain ownership of residual materials produced by the enrichment process – such as depleted uranium or "tails" – unless the customer opted to acquire it. *Id.* Title to enriched uranium would pass to the customer *only* upon delivery of the material. *Id.* ¶ 5(i).

Although a variety of contract forms were used, each of them contained common provisions that fixed the prices of the services at the government's published price in effect at the time of performance. J.A. 143. These "fixed-price" contracts further provided a ceiling price for the enriched uranium and stated that changes in the ceiling price or published rates could only be made with 180 days notice. J.A. 55.[3]

None of OPPD's contracts gave the government any right to revise the prices for uranium enrichment services following OPPD's payment for and receipt of those services. J.A. 146. Nor did the contracts contain any provisions indicating that OPPD could ever be subject to additional liability beyond the specified contract price. *Id.* 43-107. OPPD's contracts could not be amended without mutual agreement. Moreover, OPPD could terminate its contracts, in whole or in part, with a written notice of termination and payment of a termination charge. *Id.*

The government dominated the uranium enrichment market until the late 1970s, when viable foreign competition emerged. J.A. 144. The government soon became "the world's highest-priced supplier of enrichment services" and its market share

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[3] The effort involved in enriching uranium is customarily stated in terms of separative work units ("SWUs") – which is a measure of the effort necessary to produce a given quantity of enriched uranium. J.A. 143. The price for enrichment services was based on the number of SWUs necessary to produce the amount of enriched uranium acquired under the contracts. *Id.* at 139-41.

plummeted. *Id.* 144, 148; Joint Appendix in Fed. Cir. No. 0050-69, *Commonwealth Edison* v. *United States* ("Com. Ed. J.A.") 585, 532. DOE responded by developing a new contract and launching an "extensive marketing campaign" to induce OPPD (and other utilities) to remain customers. J.A. 145; Com. Ed. J.A. 59. DOE offered more flexible terms, lower prices (including a "double price guarantee" (Com. Ed. J.A. 61)), promises that prices would be controlled in the future, and representations by high-ranking government officials that the contract prices represented the full amounts utilities would be obligated to pay for the services. J.A. 160; Com. Ed. A.S.A. 60-64.

Based upon the government's representations, OPPD entered into settlement agreements with the government that terminated OPPD's existing contracts and released it from any additional liability thereunder. OPPD then executed new contracts with the government. It is undisputed that, in reliance on the fixed-price nature of the enrichment contracts and government representations regarding all-inclusive pricing, OPPD bypassed opportunities to purchase enriched uranium from other sources.

II. EPACT Imposes Retroactive Liability.

By 1992, the government's share of the uranium enrichment market dwindled further and DOE lobbied Congress to exit the business. J.A. 17. The government's exit strategy turned on creating a government-owned corporation, the United States Enrichment Corporation ("USEC"), which would perform enrichment services on a "profitable and efficient basis" in order to "maximize the long-term value of the Corporation to the Treasury," followed by the eventual sale of the enterprise to private investors. 42 U.S.C. 2297c-2(d), 2297c-5, *repealed by* USEC Privatization Act, 42 U.S.C. 2297h-5(d). Recognizing that liability for decontaminating and decommissioning expenses would depress USEC's sales price and hence substantially reduce the profits to the U.S. Treasury, the government essentially transferred the assets of its enrichment business to USEC but retained liability for environmental remediation. J.A. 149. See generally H.R. Rep. No. 102-474,

Part 2, *reprinted in* 1992 U.S.C.C.A.N. 2064. Pursuant to this arrangement, the government sold USEC to private investors in 1998 for *$1.4 billion*. James K. Glassman, *The Inside Scoop*, WASH. POST, Aug. 30, 1998, at H1.

The government established a Decontamination and Decommissioning Fund ("D&D Fund") to finance its clean-up responsibility. See 42 U.S.C. 2297g-1 *et seq.*; 10 C.F.R. 766.1 *et seq.* The D&D Fund was also designed to defray other expenses unrelated to the government's operation of the enrichment plants. Most significantly, EPACT allocated up to $310 million to clean up *privately owned and operated* thorium and uranium production facilities. 42 U.S.C. 2296a (1992). This amount has been periodically increased, so that up to *$490 million* of the D&D Fund may now be allocated to clean up private facilities that have no nexus whatsoever to the uranium enrichment contracts. Pub. L. No. 105-388, § 11(a).[4]

To help finance the D&D Fund, Congress imposed a "special assessment" of up to $150 million per year (adjusted for inflation) for fifteen years on "domestic utilities" that had purchased government-enriched uranium. 42 U.S.C. 2297g-1(c)-(e). The amount of each utility's assessment is based upon the quantities of government-enriched uranium it purchased prior to October 24, 1992. OPPD has paid more than $11 million in assessments and will ultimately be required to pay more than $19 million in assessments as a result of purchases completed as long ago as 1969.

It is undisputed that OPPD's D&D Fund liability is "not premised upon any responsibility for contamination" at the plants and, indeed, that EPACT does not base liability on either "causation or culpability for contamination." Resp. C.A. Br. ("Gov't Br.") 28, 41. Indeed, a 1992 government-sponsored study makes clear that the government's facilities were contaminated *before* OPPD made any of its purchases: "In 1969, when commercial production began, the diffusion plants

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[4] The Federal Circuit's citation of a figure of $75 million (Pet. App. 72a, n.19) is misleading because that amount represents only expenditures to date.

were already contaminated and the need to conduct D&D well established." J.A. 177; see also Pet. App. 6a. Moreover, the same study concluded that "the level of decontamination effort required for [the enrichment facilities] *is no greater now than the effort that would have been required in 1965 if all the facilities had been required to have been decommissioned at that time*." J.A. 176 (emphasis added). Further, there is no nexus whatsoever between OPPD and the private thorium and uranium enrichment plants funded by D&D Fund assessments.

Likewise, as the government has conceded, "the assessments are not premised upon any promise made by OPPD," contractual or otherwise. Gov't Br. 28. Rather, as the government asserts, the only rationale articulated by Congress in support of the billions of dollars in retroactive liability on former customers of the government's enrichment enterprise is that the assessments are justified because the utilities "benefited" from receipt of the enrichment services they purchased. *Id.* 40.

There is no dispute that the utilities paid the contractual price the government specified for the "benefit" of receiving the enriched uranium purchased under the contracts. J.A. 146. While Representative Phillip Sharp, one of the sponsors of EPACT, asserted in a floor statement that the assessments were justified because the utilities purchased the enriched uranium at "below market price," that claim is flatly incorrect.[5] By the mid-1970s, the government acknowledged that its uranium enrichment prices were generally "*the highest in the world.*" Com. Ed. J.A. 585 (emphasis added). Indeed, the impetus

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[5] Com. Ed. J.A. 470. Representative Sharp also claimed that domestic utilities benefited from saving the cost of building their own plants. However, this "benefit" is illusory. First, the Government has never approved or licensed the construction of *any* commercial uranium enrichment facility in the United States. Second, the emergence of foreign competition and the secondary market for enrichment services obviated any consideration of building a commercial enrichment facility. Third, there is no evidence indicating that, if OPPD had built a plant, it would have been anything but tremendously successful. In any event, building a plant or obtaining uranium from other sources would have enabled OPPD to avoid D&D Fund liability altogether.

behind privatizing the enrichment enterprise was that the government could not compete effectively with other producers.[6] A more apt explanation was contained in the testimony of DOE Assistant Secretary Young, who asserted that retroactively imposing additional charges for environmental clean-up on utility customers was appropriate: "[S]ince we did not pass those costs on in the past, we feel it is equitable to pass those costs on in the future." Com. Ed. A.S.A. 305.[7]

III. The Proceedings Below

OPPD's amended Court of Federal Claims complaint asserts that the retroactive D&D Fund assessment: (1) constitutes an unlawful taking; (2) violates due process; and (3) breaches the fixed-price terms of its contracts with the government. J.A. 132-64. The court granted the government's motion to dismiss the complaint for failure to state a claim. See Pet. App. 18a. While OPPD's appeal was pending, the Federal Circuit *sua sponte* ordered that a parallel suit brought by Commonwealth Edison Company be heard *en banc*, and the *en banc* court affirmed by a divided vote the lower court's dismissal of a similar challenge to EPACT. See *id.* 40a-41a.

a. In *Commonwealth Edison*, the Federal Circuit held that the Court of Federal Claims has *exclusive* trial jurisdiction, and that the Federal Circuit thus has exclusive appellate jurisdiction, over the great majority of challenges to retroactive federal exactions. See Pet. App. 54a-55a. Addressing the merits, the *en*

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[6] See Com. Ed. J.A. 454-59. Congress noted that DOE's lack of competitiveness was "ironic" because DOE's "factory costs" for producing enriched uranium were relatively low. However, prices had become noncompetitive because "artificially inflated costs" had been imposed upon it by other government agencies. *Id.* 455.

[7] Mr. Young conceded that the "driving force" behind the cost of decontaminating the plants was the mere fact they were contaminated in the first place – not the level of the contamination. A.S.A. 303. Mr. Young further conceded that the vast majority of the costs required for remediation were directly traceable to a period when the government operated the plants exclusively for government programs. *Id.* OPPD has alleged that the prices it paid necessarily included all costs that could be properly allocated to it. J.A. 146.

banc majority first rejected Commonwealth Edison's takings claim based on the views of five Justices in *Eastern Enterprises* v. *Apfel*, 524 U.S. 498 (1998), that an order to pay money, without more, cannot constitute a taking. Pet. App. 59a (citing 524 U.S. at 540 (1998) (Kennedy, J., concurring); *id.* at 554 (Breyer, J., dissenting)). The *en banc* majority furthermore rejected Commonwealth Edison's claim under the Due Process Clause. Conceding that the special assessments were "severely retroactive and costly" (*id.* 70a), the majority held that they were properly sustained under the two-part test that the court articulated to govern such claims: (1) "the party subjected to the retroactive obligations benefited from activity that contributed to a societal problem, and liability is not disproportionately imposed on that party"; and (2) "the imposition of retroactive liability would not be contrary to that party's reasonable expectations." *Id.*

b. On the contracts issue, the *en banc* court adopted the view of a prior divided panel decision in *Yankee Atomic Electric Company* v. *United States* (see Pet. App. 60a-61a). In that case, the panel majority reversed a decision of the Court of Federal Claims holding that the EPACT assessments violated the government's contractual agreements to supply enriched uranium at fixed prices. *Id.* 92a. Yankee argued that the Government was bound by its contractual promise to charge a fixed price and furthermore to assume the risk that its costs would be higher than expected. The majority acknowledged this Court's determination that "[w]here one agrees to do, for a fixed sum, a thing possible to be performed, he will not be excused or become entitled to additional compensation, because unforeseen difficulties are encountered." *United States* v. *Spearin*, 248 U.S. 132, 136 (1918), *quoted at* Pet. App. 109a. The majority thus conceded that the fixed-price enrichment contracts would "bar the Government from deliberately attempting to charge more for the performance of those contracts." Pet. App. 111a. However, the panel held that the government's imposition of the assessments was immune from any claim under the contracts if it could satisfy the "sovereign acts" or "unmistakability" doctrines. *Id.* 114a.

The court rejected Yankee's contract claim, deeming the assessments a "public and general" sovereign act, and concluding that the Government had not made an "unmistakable" promise not to impose the assessments. Pet. App. 114a. The panel held that the assessments are a sovereign act because they do not fall *exclusively* on parties that contracted directly with the government. *Id.* 103a. The court further held that the fixed-price terms of the contract did not constitute an "unmistakable" promise that would protect utilities from subsequent legislation that required them to pay additional costs based upon the same services. *Id.* 110a.

Chief Judge Mayer dissented, emphasizing that the fixed-price contracts deliberately placed the risk of any increased costs arising from performance of the contracts on the government. Pet. App. 115a, 117a. In his view, the D&D Fund's special assessments "effectively require[d] Yankee to pay for the additional costs the government incurred as a result of performing the enrichment services; the very same costs for which the government assumed the risk." *Id.* 117a. In Chief Judge Mayer's view, it was of no import that a small portion of assessments fell on parties that had indirectly purchased government-enriched uranium, because the impact of such assessments "falls substantially on the government's contracting partners." Pet. App. 118a (citing *United States* v. *Winstar Corp.*, 518 U.S. 839, 902-03 (1996) (plurality)). Finally, Chief Judge Mayer rejected the majority's application of the "unmistakability" defense, emphasizing that the parties had agreed through the fixed-price contracts to place the risk of future costs on the government. *Id.* 119a-20a.

c. The panel in this case contemporaneously issued an opinion under the constraints of the *en banc* decision (including the *en banc* court's adoption of the *Yankee Atomic* opinion), and dismissed the claims of OPPD and two other utilities. Pet. App. 1a-16a. But for the *en banc* decision, the panel would have held that the assessments violated due process. Three dissenting members of the *en banc* court adopted the panel opinion. See *id.* 91a (Mayer, C.J., joined by Newman and Rader, JJ.); *id.* 4a (Friedman, S.J., joined by Mayer, C.J.). The dissenters

emphasized that the *government* alone bore responsibility for causing the contamination. *Id.* 11a. Furthermore, "when the [u]tilities entered into the [enrichment] purchase contracts at a fixed price, they had no reason to believe, or even suspect, that years later the government would seek to make them pay for a substantial portion of its cleanup costs." *Id.*

This Petition followed.[8]

REASONS FOR GRANTING THE WRIT

For two reasons, certiorari should be granted to review the Federal Circuit's holding (adopted by the *en banc* court in the *Commonwealth Edison* case) that the EPACT assessment is not invalid as contrary to the government's contractual obligations. *First*, the Federal Circuit has extended the "unmistakability" and "sovereign acts" doctrines far beyond the context approved by this Court. Unlike cases such as *Winstar*, Petitioner does not rely on any promise by the government not to exercise its sovereign authority. Rather, the government simply agreed to charge Petitioner a fixed price for a product and agreed to assume the risk that its own costs (including costs arising from environmental issues) would be higher than anticipated. The "unmistakability" and "sovereign acts" doctrines have no role to play in this context, and the Federal Circuit's contrary decision calls into question the federal government's reliability as a contracting partner with respect to even the most "humdrum supply contract," particularly given the Federal Circuit's exclusive jurisdiction over government contracts claims.

Second, in the event this Court determines that the government's sovereign defenses to contract claims do apply, this case is an ideal successor to *Winstar*, which has generated substantial uncertainty in the lower courts. In particular, this case presents the opportunity to articulate a clear standard regarding the circumstances in which the "unmistakability"

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[8] Question 2 presented by this Petition addresses Petitioner's constitutional challenges to the EPACT assessment. As to that Question, Petitioner adopts by reference the Petition for Certiorari contemporaneously filed in the *Commonwealth Edison* case.

doctrine is triggered. Similarly, only four Justices in *Winstar* addressed the facts under which the "sovereign acts" doctrine applies, and that issue is squarely presented in this case because the government's overriding purpose in imposing the EPACT assessment was its own self-interest in generating profits from the sale of USEC.

I. Certiorari Should Be Granted Based On The Importance Of the *En Banc* Federal Circuit's Construction Of The "Sovereign Acts" and "Unmistakability" Doctrines.

a. This Court should grant certiorari to review the *en banc* Federal Circuit's broad holding that the "sovereign acts" and "unmistakability" doctrines apply to cases that do not even ostensibly involve any supposed promise by the government to impair the exercise of its sovereign authority. Under this Court's precedents, those doctrines protect the government from liability when "sovereign acts, needful for the public good, will incidentally disable [the government] or the other party from performing one of the promised acts." *United States* v. *Winstar Corp.*, 518 U.S. 839, 921 (1996) (Scalia, J., concurring). The point of such uniquely sovereign defenses is thus to put the government on equal footing with private contractors. The classic statement of the law is that "[w]hen the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals." *Mobil Oil Exploration & Producing S.E.* v. *United States*, 530 U.S. 604, 607 (2000) (quoting *Winstar*, 518 U.S. at 895 (plurality), quoting in turn *Lynch* v. *United States*, 292 U.S. 571, 579 (1934)).

Thus, although the government has no special privilege as a contracting party, neither does it assume special liabilities. In particular, in the event of a sovereign regulatory change, the government is no more liable than would be a similarly situated private party, which would have resort to the doctrine of impossibility. The only exception is for situations in which the government makes a sufficient promise against sovereign action, either by "indemnifying its contracting partners against financial losses arising from regulatory change" (*Winstar*, 518 U.S. at 887

(plurality)) or by unmistakably "promis[ing] to regulate them in a particular fashion" (*id.* at 921 (Scalia, J., concurring)).

Winstar and similar cases thus addressed assertions by private parties that the government had made a contractual commitment to engage in, or abstain from, sovereign actions. In particular, those decisions addressed whether and when the government "as contractor" must make an "unmistakable" promise in order to be deemed bound by a contract, and thus required to pay damages, in the event the government "as sovereign" adopts a regulatory change that breaches the supposed contractual promise. See *Horowitz* v. *United States*, 267 U.S. 458 (1925) (contractor not entitled to damages when embargo prevented government from performing contract); *Bowen* v. *Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41 (1986) (government not liable for damages when change in Social Security Act eliminated right of state employees to withdraw from coverage); *United States* v. *Cherokee Nation of Okla.*, 480 U.S. 700 (1987) (government not liable for damages because grant of ownership of a river bed did not abrogate government's right to regulate the navigability of the river); *D & L Construction Co.* v. *United States*, 185 Ct. Cl. 736 (1968) ("while the United States cannot be held liable directly or indirectly for public acts which it performs as a sovereign," it can agree to compensate a party for damages resulting from exercise of sovereign power).

In *Winstar* itself, this Court held that the government was required to pay damages under its contracts with private banks despite the enactment of provisions in the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA") that prevented the government from providing the promised regulatory treatment. A plurality held that the unmistakability doctrine was irrelevant because the government had promised to pay the banks in the event of regulatory change (518 U.S. at 887) – a risk-shifting promise that did not implicate its sovereign powers – and furthermore held that the sovereign acts doctrine was irrelevant because the government could not establish an impossibility defense given that the parties were aware of the risk of regulatory change at the time of contracting (*id.* at 908-

10). Three concurring Justices equated the unmistakability and sovereign acts doctrines, concluding that both are satisfied "whenever it is clear from the contract in question that the Government was *committing itself not to rely upon its sovereign acts* in asserting (or defending against) the doctrine of impossibility." *Id.* at 923 (Scalia, J.) (emphasis added). The concurrence held that both doctrines were applicable, but that they were both satisfied, because the government had made an unmistakable promise not to change the regulatory framework. *Id.*

Petitioner's claims would thus be subject to the "sovereign acts" and "unmistakability" doctrines if Petitioner were relying on a supposed promise by the government not to engage in sovereign regulation. That would be true if, for example, EPACT had changed the governing regulatory scheme by banning any party (including the government) from enriching or transporting uranium. In response to the utilities' suit contending that the government was liable for failing to fulfill its supply obligations in that circumstance, the government's defense would be that the regulatory change made performance impossible. Under the "unmistakability" and "sovereign acts" doctrines, the utilities could prevail only if, in the contracts, the government had (a) promised to indemnify the utilities in the event of regulatory change or could satisfy the impossibility doctrine (according to the *Winstar* plurality), or (b) promised not to change the regulations in the future at all (according to the concurrence).

b. Certiorari is warranted because the *en banc* Federal Circuit refused to limit the "sovereign acts" and "unmistakability" doctrines to their previously recognized role of imposing a heightened burden when a private party claims the government committed itself by contract not to engage in sovereign regulatory change. The contractual "promise" on which Petitioner relies is not a promise by the government to abstain from regulation, or even to indemnify Petitioner in the event of such an exercise of sovereign authority. Rather, the government's agreement to provide enriched uranium at a fixed-price is merely a "garden variety" promise (*Winstar*, 518 U.S. at

911 (plurality)) wherein the seller (here, the government) agreed to charge a fixed price and to assume a "risk" – *viz.*, the risk that the costs associated with production of enriched uranium would be higher than anticipated.[9]

That the fixed-price enrichment contracts allocated the parties' rights and responsibilities in this fashion is not disputed. Long ago, this Court made clear that "[w]here one agrees to do, for a fixed price, a thing possible to be performed, he will not be excused or become entitled to additional compensation because unforeseen difficulties are encountered." *Spearin* v. *United States*, 248 U.S. 132, 136 (1918). Long-standing Court of Federal Claims precedent similarly recognizes that "the [seller] in a fixed-price contract assumes the risks of unexpected costs. In firm fixed-price contracts, risks fall on the [seller], and the [seller] takes account of this through his prices." *ITT Arctic Servs.* v. *United States*, 524 F.2d 680, 691 (1975). See also *Dalton* v. *Cessna Aircraft Co.*, 98 F.3d 1298, 1305 (CAFC 1996) ("Because fixed-price contracts do not contain a method for varying the price of the contract in the event of unforeseen circumstances, they assign the risk to the [seller] that the actual cost of performance will be higher than the price of the contract."). That basic principle of contract law applies fully to the Government. See *Mobil Oil*, *supra*.[10]

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[9] The Federal Circuit acknowledged this point in the *Yankee Atomic* decision: "To be sure, the contracts at issue in the present case may be viewed as risk-shifting agreements, similar to those that the *Winstar* plurality found not to implicate the unmistakability doctrine." Pet. App. 109a.

[10] Although it thus makes no difference at what point the government realized its costs were higher than anticipated, the Federal Circuit was manifestly wrong in stating that EPACT was intended to spread "later discovered costs of contamination." A DOE study explains that, "[i]n 1969, when commercial production began, the diffusion plants were already contaminated and *the need to conduct D&D well established.*" J.A. 177 (emphasis added). Moreover, starting in the 1970s, DOE repeatedly rebuffed GAO recommendations to include in its prices for enrichment services a discrete element for anticipated decontamination expense. Com. Ed. J.A. 576. The fact that the government would someday face expenses for decontaminating its plants was well understood from the inception of the

Nor is it disputed that the EPACT assessment abrogates the Government's promise to take on the risk of additional costs. DOE thus made clear in testimony before Congress that the assessments sought additional money from the government's "commercial customers" to pay for clean-up costs the government planned to retain in conjunction with its plan to spin off its enrichment business to the private sector. Com. Ed. A.S.A. 305. The bold justification for imposing such additional costs was simply stated: "since we did not pass those costs on in the past [under the enrichment contracts], we feel it is equitable to pass-those costs on in the future." Com. Ed. A.S.A. 305.

The contrast between this case and *Winstar* is once again illustrative. In *Winstar*, the government encouraged banks to take over failing thrifts through favorable accounting treatment. But suppose that the government had instead seized the thrifts and sold them to banks for a fixed price calculated to cover the thrifts' losses. Under settled principles (see *supra* at 14), the contract would assign to the government the risk that it had underestimated the correct sales price. Suppose further that, long after the transactions had closed, Congress concluded that the thrifts' losses were higher than anticipated and decided to recoup the government's losses by adopting a multi-billion-dollar assessment payable by the banks or their successor purchasers. A suit by the purchasing banks based on the contracts would simply rely on the government's promise to charge a certain price, which has nothing to do with a promise by the government not to utilize its sovereign regulatory authority. In other words, no government regulation would prohibit the sales from occurring as originally agreed. But on the *en banc* Federal Circuit's holding in this case, the unmistakability and sovereign acts doctrines would apply, making the price terms of the banks' contracts *meaningless* because they contained no unmistakable promise that the government would not later shift the allocation of financial risks.

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commercial sales programs, and the government entered into the enrichment contracts with full knowledge of this fact.

In this fashion, the Federal Circuit's decision transforms doctrines intended as shields for the government from inequitable treatment in the face of regulatory change into swords with which the government can abrogate its contractual obligations. The government's sovereign defenses to contract claims have never before been applied to immunize governmental action specifically designed to "abrogate the essential bargain of the contracts at issue." *Winstar*, 518 U.S. at 924 (plurality). The decision below, however, holds that a private party must secure not only a promise from the government to take on a financial risk, but also a *second* promise that the government will not later realign that risk by regulation. Cf. *Winstar*, 518 U.S. at 922 (Scalia, J., concurring) ("Indeed, it is hard to imagine what additional assurance that the course of regulation would not change could have been demanded – other than, perhaps, the Government's promise to keep its promise. That is not what the doctrine of unmistakability requires."). Thus, the Federal Circuit held that Petitioner could be required to assume the costs of environmental remediation in this case because, although the government plainly took on that risk in the contracts, the contracts do not "unmistakably" promise that the government would not later reassign the costs to the utilities. Pet. App. 112a.[11]

c. The *en banc* Federal Circuit's holding thus marks a sea change in the law that merits this Court's review because it cannot but seriously undermine the private sector's faith in the government "as a reliable contracting partner in the myriad workaday transactions of its agencies." *Winstar*, 518 U.S. at 883 (plurality). The Court of Federal Claims (and thus the

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[11] This case accordingly presents facts similar to *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234 (1978), in which this Court held that a state-imposed "pension funding charge" constituted an unconstitutional impairment of contract. The assessment did not abrogate any explicit contractual agreement between the plan sponsors and participants, but rather imposed an *additional* obligation that fundamentally changed the nature of their bargain. In addition, this Court found it significant that the assessment was retroactive, was imposed in an area in which reliance on prior law was critical, was targeted at a specific set of contracts, and was not directed at any generalized economic or social problem.

Federal Circuit) has essentially exclusive jurisdiction to resolve claims against the government for breach of contract. See 28 U.S.C. 1491(a)(1). Subsequent cases will be governed by the test announced in this case because the court of appeals' articulation of the "unmistakability" and "sovereign acts" doctrine is broadly applicable, and in no way limited to EPACT or the nuclear industry.

The importance of the decision below is heightened by the fact that, although few government contracts allocate the risk of regulatory change (as in *Winstar*), essentially *every* government contract addresses the basic exchange of a good or service for money. The *Winstar* plurality pointed out that, "in the world of regulated industries, * * * the risk that legal change will prevent the bargained-for performance is always lurking in the shadows." 518 U.S. at 869. The decision below, by contrast, governs the mine-run of government contracts, in which the price to be paid and the services to be delivered are not merely in the shadows but front and center in klieg lights.

Thus, the decision below extends what were previously narrow doctrines to a circumstance in which previously "no one would seriously [have] contend[ed]" they applied: "humdrum supply contracts." *Winstar*, 518 U.S. at 880 (plurality). In this particular case, the risk assumed by the government is the cost of cleaning up pollution, but it could just as easily be the risk of higher costs for supplies or transportation, or even for employee salaries or pensions. It is not disputed that the "second promise" required by the *en banc* Federal Circuit is utterly unheard of in government contracting and any such requirement throws the reliability of the United States as a contracting partner squarely into question.

II. Certiorari Should Be Granted Because This Case Is A Natural Successor To *Winstar*.

Apart from the Federal Circuit's unwarranted extension of the "unmistakability" and "sovereign acts" doctrines beyond cases presenting a supposed governmental promise not to exercise its sovereign authority, certiorari is also warranted because this case presents an important opportunity for this

Court to resolve the uncertainty that exists in the wake of its fragmented decision in *Winstar*. As has often been repeated, "Courts have struggled with the meaning of *Winstar*." *Tamarind Resort Assocs.* v. *Gov't of the Virgin Islands*, 138 F.3d 107, 112 (CA3 1998), *quoted in Pitney Bowes, Inc.* v. *USPS*, 27 F. Supp. 2d 15, 23 (DDC 1998), *and United States* v. *Wetlands Water Dist.*, 134 F. Supp. 2d 1111, 1145 (EDCA 2001). As recently detailed by a federal district court:

> Although seven Justices formed the majority to support the *Winstar* unmistakability judgment (*i.e.*, that it did not shield the government from liability), there was not a majority opinion, and the four separate opinions are thoroughly fragmented, not articulating any unified analysis in support of the judgment based on either the unmistakability or sovereign acts doctrines.

Wetlands Water Dist., 134 F. Supp. 2d at 1146-47. See also Joshua I. Schwartz, *The Status of the Sovereign Acts and Unmistakability Doctrines in the Wake of* Winstar*: An Interim Report*, 51 ALA. L. REV. 1177, 1222 (2000) (noting "the significant unresolved and ambiguous points that flow from the decision of the splintered majority in the Supreme Court"). This case is an ideal vehicle to provide needed clarity in the law.

No majority of the Court in *Winstar* articulated a test governing the circumstances in which the unmistakability doctrine is triggered. The four-Justice plurality broadly concluded that the doctrine is irrelevant whenever, as in this case, the plaintiff seeks not to block the government's exercise of its sovereign authority but rather to enforce a risk-shifting agreement by the government. 518 U.S. at 88. The three concurring Justices, writing in that case only "briefly" (*id.* at 919), disagreed that risk shifting obviates the unmistakability doctrine in one particular context: cases in which the plaintiff's claim turns on a supposed promise by the government not to exercise its sovereign power to regulate (*id.* at 921). Given the limited reach of the *Winstar* concurrence, no majority of the Court addressed whether the unmistakability doctrine applies in the much more common circumstance (presented by this case) in

which the government assumed the basic risk of liability from unexpected costs, not the risk of sovereign regulation.

"As a result of these shifting positions, it appears particularly problematic to predict which unmistakability standard applies to any specific contract." *Wetlands Water Dist.*, 134 F. Supp. 2d at 1148. Indeed, "[u]nfortunately, but not unsurprisingly, given the Supreme Court opinion, the few cases applying the unmistakability doctrine after *Winstar* (most from the Federal Circuit) also diverge in their formulation and interpretation of the doctrine." *Id.* As the Court of Federal Claims – the principal federal court adjudicating government-contractor disputes – has bluntly stated, "This court, and, undoubtedly, many others would welcome further clarification" of the status and scope of the unmistakability doctrine. *Adams* v. *United States*, 42 Fed. Cl. 463 (1998).

The essential need for further guidance from this Court after *Winstar* is even more apparent with respect to the "sovereign acts" doctrine. Long-standing precedent holds that the doctrine applies to "public and general" acts of the government (*Horowitz* v. *United States*, 267 U.S. 458, 461 (1925)), but this Court has not yet decided what constitutes a "public and general" act when, as in this case, the government acts not merely for the public good but also for its own fiscal self-interest. Only four Justices in *Winstar* addressed the issue: three members of the plurality concluded that the doctrine does not apply when governmental regulation has a "substantial effect" on the government's own contractual obligations (518 U.S. at 896-99)[12]; the Chief Justice disagreed in dissent (*id.* at 926-27). The *Winstar* concurrence found it unnecessary to articulate any more general test because, in its view, "it was an unquestionably sovereign act of government – enactment and implementation of provisions of FIRREA regarding treatment of regulatory capital – that gave rise to respondents' claims of

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[12] See also *Winstar*, 518 U.S. at 897-98 (plurality) ("governmental action will not be held against the Government for purposes of the impossibility defense so long as the action's impact upon public contracts is * * * merely incidental to the accomplishment of a broader governmental objective").

breach of contract." 518 U.S. at 920. Justices O'Connor and Ginsburg did not join any opinion addressing the issue. The result is "a 3-1 splintering (Justices Souter, Stevens, and Breyer versus [Chief] Justice Rehnquist)." *Wetlands Water Dist.*, 134 F. Supp. 2d at 1152.

This case squarely presents the issue for decision. The Federal Circuit held that the EPACT assessment is a "sovereign act" because – although it is targeted at the government's "promise" to charge a certain price and the very "risk" allocated by the contracts (that the government would incur additional costs) – the assessment is not imposed *only* on the government's direct contracting partner. Pet. App. 103a. However, it is undisputed that *at least eighty-five percent* of the cost of the D&D Fund assessments fall on utilities that contracted directly with the government. Pet. App. 118a. There is no serious dispute that, on any number of other formulations of the sovereign acts doctrine – including the *Winstar* plurality's view that the doctrine does not apply when the government's action "substantially affects" its contractual obligations – the Federal Circuit's test is erroneous as a matter of law.[13]

This is a particularly appropriate vehicle for this Court to address the extent to which the government's self-interest affects the "sovereign acts" doctrine. The Court has engaged in more searching review of self-interested governmental exactions in both the Contract Clause and Due Process Clause contexts. See *United States* v. *James Daniel Good Real Property*, 510 U.S. 43, 55 (1993) (Due Process Clause) (quoting *Harmelin* v. *Michigan*, 501 U.S. 957, 979 n.9 (1991) (opinion of Scalia, J.)); *Energy Reserves Group, Inc.* v. *Kansas Power & Light Co.*, 459 U.S. 400, 412-13 (1983) (Contract Clause); see also *Eastern Enterprises*, 524 U.S. at 544 (heightened scrutiny applicable to "the Government's self-enrichment") (Kennedy, J., concurring). Three members of the *Winstar* plurality took the view in that case that "the greater the Government's self-interest * * * the more suspect becomes the claim that its private contracting

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[13] As previously stated, the legislative history of EPACT makes clear that the government principally targeted its "commercial customers."

partners ought to bear the financial burden of the Government's own improvidence." *Winstar*, 518 U.S. at 898. As noted, the concurrence and Justices O'Connor and Ginsburg did not reach that issue, so it remains unresolved.

For its part, the Federal Circuit eschewed any consideration of the blatant self-dealing that permeates EPACT. For decades the government generated enormous revenues by furnishing enriched uranium to commercial customers under fixed-price contracts. After electing to sell its uranium enrichment business to private investors, the government significantly enhanced the value of the enterprise by agreeing to retain responsibility for cleaning up its enrichment plants. This ploy was ultimately successful and yielded the Treasury $1.4 billion. However, not content with this profit, the government also shifted a staggering $2.25 billion in plant-related costs onto its former customers by imposing the EPACT assessments. Although the government's pecuniary interest in garnering this revenue is obviously strong, its justifications – that the utilities "benefited" from receipt of enriched uranium and had not been previously charged for plant clean-up costs (Com. Ed. A.S.A. 305) – ring hollow. Under their fixed price contracts, the utilities paid the specified price for the benefits they received and it is indisputable that the government bore the risk of all costs arising in connection with the performance of the contracts.

In this respect, the Federal Circuit's test is also in considerable tension with the standard applied by both the Ninth and the Tenth Circuits. The Ninth Circuit has recently held that the "sovereign acts" doctrine was inapplicable to "a narrow, targeted piece of legislation aimed at relieving the government from onerous provisions contained in a finite number of specific contracts it had already entered." *Kimberly Assocs.* v. *United States*, 261 F.3d 864, 879 (2001). The Tenth Circuit holds that the "sovereign acts" doctrine applies only "when the government enacts legislation of general applicability for the benefit of the general welfare and such legislation inadvertently affects the government's performance of a contract to which it is a party." *Resolution Trust Corp.* v. *Federal Sav. & Loan Ins.*

Corp., 25 F.3d 1493, 1501 (1994). EPACT unquestionably fails both those standards.

The Federal Circuit's test also merits review because it is essentially arbitrary, for it bears no relationship to the interests protected by the sovereign acts doctrine. The provision of EPACT that the Federal Circuit found critical is merely a cost-pass-through device. Recognizing that utilities sometimes resold, or transferred their right to receive government-enriched uranium to other parties, EPACT provides that "a utility shall be considered to have purchased a separative work unit from the Department if such separative work unit was produced by the Department but purchased by the utility from another source." Pet. App. 138a. This provision merely passes the liability imposed by the assessment through the prime contractor, elevating the subsequent buyers to the same status as the original purchaser. The fact that the government used its legislative power to pass through costs associated with the assessments does not disguise the fact that the assessments breach the government's *original* promise to provide the enriched uranium at a fixed price. The sovereign acts doctrine was never intended to support such a direct abrogation of a contractual promise.[14]

III. The Question Presented Is A Natural Companion To The Parallel Petitions Presenting Constitutional Challenges To The EPACT Assessment.

Certiorari is also warranted because the contracts question raised by this case presents the Court with the opportunity to consider, in a comprehensive fashion, the legality of the EPACT

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[14] In other circumstances, the Federal Circuit's test is arguably *under*-protective of the government's interests. The court of appeals indicated that a regulation limited exclusively to the government's contracting partners would not be protected as a "sovereign act." See Pet. App. 61a. Imagine, however, that the government, for security reasons, enacted a previously unforeseeable ban on transporting uranium from its enrichment facilities under the contracts, rendering the government's performance impossible. Although that hypothetical is far closer to the prototypical instance in which the sovereign acts doctrine should protect the government from liability, it would be excluded under the Federal Circuit's standard.

assessment, which is, for the reasons described in the various petitions for certiorari now pending, a statute of considerable importance. The contract issue presented by this Petition is a logical predicate to the constitutional challenges to the statute, not only because it presents a narrower ground on which to resolve the case but also because the utilities' rights under the contracts inform their expectations under the Takings and Due Process Clauses that they would not be subject to retroactive liability. See Pet. App. 75a (holding of *en banc* majority that contracts created no protected expectations); Pet. for Cert., No. 01-___, *Commonwealth Edison Co.* v. *United States* (challenging that determination).

The contractual and constitutional issues are bound up together for the further reason that the Federal Circuit decided them on inconsistent premises. Thus, in its contract ruling, the court of appeals maintained that the scope of the environmental risk from enrichment was not known until the mid-1980s. See Pet. App. 94a. In its constitutional rulings, by contrast, the court held that Petitioner had no expectation against retroactive liability because the environmental risks had been known for decades. See *id.* 76a. Another example is the Federal Circuit's determination, in the contract ruling, that the assessment is not a retroactive price increase because it is indistinguishable from a sovereign tax. See *id.* 103a. In the constitutional ruling, by contrast, the court held that the assessment is *not* a tax. See *id.* 64a. Thus, the assessment was not subject to this Court's precedents holding that imposing new taxes based upon past actions offends due process and only a very limited period of retroactivity can be tolerated. See *Nichols* v. *Coolidge*, 274 U.S. 531, 542 (1927) (new tax based upon "past lawful transactions * * * beyond recall" violated due process); *Blodgett* v. *Holden*, 275 U.S. 142, 147 (1927); *United States* v. *Carlton*, 512 U.S. 26, 38 (1994) (O'Connor, J., concurring) (a period of retroactivity longer than one year preceding the legislative session in which it was enacted raises "serious constitutional questions").

Consolidated review of the challenges to EPACT will permit the statute to be considered in a coherent fashion.[15]

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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[15] Petitioner's specific suggestion is that the Court grant certiorari in the *Commonwealth Edison* Petition, which clearly presents both the contractual and constitutional issues. Alternatively, if the Court prefers to address those issues separately, it could grant certiorari in this Petition as well.

APPENDIX A

UNITED STATES COURT OF APPEALS
FEDERAL CIRCUIT

Nos. 99-5156, 99-5158 and 99-5160.

MAINE YANKEE ATOMIC POWER COMPANY,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee,

SACRAMENTO MUNICIPAL UTILITY DISTRICT,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee,

OMAHA PUBLIC POWER DISTRICT,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee.

Nov. 20, 2001

Before MAYER, *Chief Judge*, FRIEDMAN, *Senior Circuit Judge*, and GAJARSA, *Circuit Judge*.

PER CURIAM.

In the Energy Policy Act of 1992, Congress imposed liability upon nuclear electric power companies that had purchased enriched uranium from the United States—the

purchases having been made as far back as 1969—for a substantial portion of the government's costs of decontaminating the plants in which it had enriched the uranium. The three appellants—electric utilities that had purchased enriched uranium from the government for their nuclear power plants and who were subject to, and had paid part of, the statutory liability—sued the United States in the Court of Federal Claims, challenging the assessments as a taking of their property for which they sought just compensation and as an unconstitutional retroactive statutory application that denied them due process and equal protection. On the government's motion, the Court of Federal Claims dismissed the complaints, holding that they did not set forth valid constitutional claims.

In *Commonwealth Edison Co. v. United States*, No. 00-5069, also decided today, this court en banc has upheld the constitutionality of that statutory assessment against similar challenges, namely that it takes the property of another utility and denies that utility due process. That decision binds this panel, and requires us to reject the utilities' taking and due process arguments in the instant case.

Two of the utilities in this case, Maine Yankee Atomic Power Company and Sacramento Municipal Utility District, also argue that the statute denies them equal protection—a contention not made in *Commonwealth Edison*. As the Court of Federal Claims stated, the utilities argued that "the fact that foreign utilities were exempted from the assessment impermissibly differentiates between similarly—situated entities—*i.e.*, all those that had consumed government-enriched uranium. In addition, plaintiffs contend, the Act draws an illegitimate distinction between purchasers who resold the uranium, and those who kept it for their own purposes, as well as between pre 1992 consumers (who are subject to the fee) and post 1992 consumers (who are exempt)." *Maine Yankee Atomic Power Co. v. United States*, 44 Fed.Cl. 372, 383 (1999).

The Court of Federal Claims correctly rejected those contentions. We rely upon and accept that court's reasoning:

> With regard to Congress's decision to exempt foreign utilities from liability, we refer to the Supreme Court's observation in *Barclay & Co. v. Edwards*, 267 U.S. 442, 451, 45 S.Ct. 348, 69 L.Ed. 703 (1924) that "[c]onsiderations of policy toward foreign countries may very well justify an exemption of the foreign corporations from taxes that might legitimately be imposed on them, but which Congress does not think it wise to exact." In addition, we think it significant that, as defendant points out in its motion to dismiss, the exclusion of foreign utilities from the liability equation in no way increases or otherwise affects plaintiffs' portion of domestic utility usage.
>
> Similarly, legislatures need not burden the most responsible party to survive rational basis review. *Association of Bituminous Contractors, Inc. v. Apfel*, 156 F.3d 1246, 1255-56 (D.C.Cir.1998). While the original purchasers of uranium (those who resold it and were therefore exempt from assessment) may seem, to plaintiffs, equally to have benefited from the enrichment services, we cannot conclude that Congress's decision to target end-users was without rational basis. And although plaintiffs may have preferred a system under which USEC's post 1992 customers likewise picked up the tab, Congress's assignment of liability for a past problem to past consumers does not stretch the limits of the reasonable.

Id.

The judgments of the Court of Federal Claims dismissing the complaints are

AFFIRMED.

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Concurring opinion of FRIEDMAN, *Senior Circuit Judge*, in which MAYER, *Chief Judge*, joins.

Since I agree that we are bound by *Commonwealth Edison* and also agree with the court's rejection of the equal protection contention, I join in the opinion and judgment of the court. If I were not bound by *Commonwealth Edison*, however, I would hold that the retroactive assessment denies the appellants due process. My reasons for that conclusion follow.

I

A. During World War II, the United States began enriching uranium, first for military purposes and, starting in the mid 1960s, as nuclear fuel for commercial generation of electricity, which it sold to domestic and foreign utilities. *Maine Yankee Atomic Power Co. v. United States*, 44 Fed.Cl. 372, 374 (1999). The government sold the enriched uranium under fixed price contracts, which did not authorize the government to collect any additional amounts. *Id.* The decontamination and decommissioning of these polluted facilities is expected to take 40 years and to cost up to $20 billion. *Yankee Atomic Elec. Co. v. United States*, 112 F.3d 1569, 1572 (Fed.Cir.1997).

Congress dealt with this problem in the Energy Policy Act of 1992 ("the Act" or "the Energy Act"). *See generally id.* That was comprehensive legislation designed to implement a "national energy policy," a reaction, at least in part, to the adverse economic effects of an oil embargo associated with the military conflict in the Persian Gulf. H.R.Rep. No. 102-474(I), at 132 (1992), *reprinted in* 1992 U.S.C.C.A.N. 1953, 1955.

In this legislation, Congress sought to "reform the current uranium enrichment program of the [government] so that it will be operated in a more business-like fashion."

H.R.Rep. No. 102-474(I), at 142 (1992), *reprinted in* 1992 U.S.C.C.A.N. 1953, 1965. The Act established the United States Enrichment Corporation ("Enrichment Corporation") as a government corporation to assume the operation of the government's uranium enrichment services, 42 U.S.C. § 2297, and "which eventually could be sold to the private sector." H.R.Rep. No. 102-474(I), at 142-43 (1992), *reprinted in* 1992 U.S.C.C.A.N. 1953, 1965-66. The Act required that the Enrichment Corporation "[w]ithin 2 years prepare a strategic plan for transferring ownership of the Corporation to private investors." 42 U.S.C. § 2297d(a). The "key purposes of the Corporation includ[ed] providing enrichment services in a business-like fashion, maximizing the economic return to the [government]." H.R.Rep. No. 102-474(I), at 198 (1992), *reprinted in* 1992 U.S.C.C.A.N. 1953, 2021.

The Act provided that the Enrichment Corporation would not be liable for the costs of cleaning up and closing the government's uranium enrichment facilities. 42 U.S.C. § 2297c-2(d). Instead, the Act established the Uranium Enrichment Decontamination and Decommissioning Fund ("Fund") for that purpose. § 2297g. The Fund is financed through both Congressional appropriations and an assessment on those domestic utilities that purchased and used government enriched uranium. § 2297g-1(b).

The Fund is instructed to obtain up to $480 million per year (to be adjusted annually for inflation), with at most $150 million from a special assessment on the domestic utilities. § 2297g-1(a), (c). That assessment is based on each utility's share of the government's enriched uranium sales (whether purchased directly from the government or from another source), which were made prior to October 24, 1992 and that it did not resell. § 2297g 1(c). The special assessment terminates after 15 years or after $2.25 billion has been collected. § 2297g-1(e).

The Act also provided that the special assessments "shall be deemed a necessary and reasonable current cost of fuel and shall be fully recoverable in rates in all jurisdictions in the same manner as the utility's other fuel cost." 42 U.S.C. § 2297g-1(g).

B. The three appellants filed separate complaints in the Court of Federal Claims, as did a number of other similarly-situated electric utilities. They contend that the special assessment constituted a breach of the fixed-price contract under which they had purchased enriched uranium from the government. The complaints included the following factual allegations, which we accept for purposes of the government's motions to dismiss. *Highland Falls-Fort Montgomery Cent. Sch. Dist. v. United States*, 48 F.3d 1166, 1169-70 (Fed.Cir.1995) ("[W]e assume that all well-pled factual allegations are true and indulge in all reasonable inferences in favor of the movant.").

The appellants—Maine Yankee Atomic Power Company ("Maine Yankee"), Sacramento Municipal Utility District ("Sacramento District"), and Omaha Public Power District ("Omaha District") (collectively "the Utilities")—all operated nuclear power plants and purchased government-produced enriched uranium before 1992. Thus, as domestic utilities that purchased and used government provided enriched uranium, each is liable for a portion of the Act's special assessment, and each has paid millions of dollars.

The Utilities also allege that the government completely contaminated its enrichment facilities (buildings, equipment, property, and surrounding property) prior to 1969, at a time when they were used almost exclusively for defense purposes. Little, if any, additional contamination occurred after 1969, when these facilities were used to enrich uranium for sale to commercial utilities.

Maine Yankee is a domestic utility that operated a single nuclear power plant, which was permanently closed in 1996. It purchased enriched uranium from the government from 1970 to 1986 under two contracts, one executed on October 2, 1970 and the other on November 4, 1982. On its purchases of government enriched uranium, Maine Yankee is subject to a $25 million special assessment, of which it has paid more than $9.8 million.

Sacramento District is a municipal utility district in California that generates electricity and operated a nuclear generating facility, which it closed in 1989. During the operation of that facility, the Sacramento District purchased enriched uranium from the government, beginning in 1969 and ending in 1981. In 1990, the Sacramento District terminated its contract for purchasing enriched uranium. Because of those purchases, Sacramento District has paid $5.8 million in special assessments and expects its total liability to reach $8 million.

Omaha District is a domestic utility that generates and supplies electricity in Nebraska. It purchased enriched uranium from the government between 1969 and 1992 under two contracts. Omaha District has paid special assessments of more than $7.4 million, and estimates its total liability to be nearly $20 million.

One of the other utilities that filed such a suit in the Court of Federal Claims was Yankee Atomic Electric Company. That court granted Yankee Atomic summary judgment, holding that "the assessment imposed upon Yankee Atomic to fund clean-up costs constitutes an unlawful exaction because it violates the Government's earlier contractual agreements to supply enriched uranium at fixed prices." *Yankee Atomic Elec. Co. v. United States*, 112 F.3d 1569, 1571 (Fed. Cir.1997). On the government's appeal, we reversed. *Id.* We held that the special assessment did not constitute a retroactive increase of the contract price, *id.* at 1575, but

instead "constitutes a general exercise of Congress's taxing power for the purpose of addressing a societal problem rather than an act that retroactively increases the price charged to contracting parties for uranium enrichment services," *id.* at 1577.

After our decision in *Yankee Atomic*, the Utilities amended their complaints to assert claims not addressed in *Yankee Atomic;* namely, that the assessment was a taking of their property and denied them due process in violation of the Fifth Amendment. Maine Yankee and the Sacramento District also asserted that the assessment denied them equal protection.

On the government's motion, the Court of Federal Claims granted summary judgment dismissing the complaints for failure to state a claim upon which relief could be granted. *Maine Yankee Atomic Power Co. v. United States*, 44 Fed. Cl. 372 (1999); *Omaha Pub. Power Dist. v. United States*, 44 Fed. Cl. 383 (1999); *Sacramento Mun. Util. Dist.*, 44 Fed.Cl. 395 (1999).

In an opinion dealing with the three cases (but issued separately for each case), the court first held that *Yankee Atomic* was not stare decisis on the constitutional issues the Utilities raised. *Maine Yankee,* 44 Fed.Cl. at 376-77. In holding that the complaints did not state a valid takings claim, the court concluded that none of the factors in "a traditional takings analysis . . .—the economic impact of the legislation, the reasonableness of plaintiffs' investment-backed expectations and the character of the government action—support the finding of a taking of property." *Id.* at 381. The court rejected the Utilities' due process claim based on the retroactivity of the assessment. *Id.* at 379-80. The court concluded its discussion of these issues with the following statement:

> Whether we analyze the assessment under the Due Process Clause, under the Takings Clause, or under some amalgam of the two, we are, in the end, faced with a

> single, basic question: Is it inherently unfair, unjust, or irrational for Congress, when faced with costs resulting from the enrichment of uranium, to ask those parties who received the uranium to contribute to the solution? The answer, quite clearly, is no. Plaintiffs' assessments are directly proportional to their usage of uranium enrichment services the very services which created the contamination. Congress itself took responsibility for more than two thirds of the clean-up costs and assigned the rest, as a general tax, to the rate-payers in districts which had previously benefited from nuclear power. Such a scheme can hardly be construed as beyond the reach of fairness or rationality.

Id. at 382-83.

Finally, the court rejected the claim that the special assessment denied Maine Yankee and the Omaha District equal protection because it did not cover (1) foreign utilities or (2) utilities that purchased but resold government-enriched uranium. The court denied this claim since "legislatures need not burden the most responsible party to survive rational basis review." *Id.* at 383 (citing *Ass'n of Bituminous Contractors, Inc. v. Apfel*, 156 F.3d 1246, 1255-56 (D.C.Cir.1998)).

II

A. The Supreme Court has noted that "the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994) (footnotes omitted). When the retroactivity is severe, the legislation may violate the Due Process Clause. *See United States v. Carlton*, 512 U.S. 26, 32, 114

S.Ct. 2018, 129 L.Ed.2d 22 (1994) (concluding that the application of a 1987 federal tax statute to a 1986 transaction did not violate due process in part because "Congress acted promptly and established only a modest period of retroactivity."); *see also id.* at 38, 114 S.Ct. 2018 (O'Connor, J., concurring) ("A period of retroactivity longer than the year preceding the legislative session in which the law was enacted would raise, in my view, serious constitutional questions."). In exceptional circumstances not involving tax law, however, longer retroactivity has been held not to deny due process. *See Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 96 S.Ct. 2882, 49 L.Ed.2d 752 (1976), discussed in Part III B below.

Another pertinent principle is that economic legislation has a presumption of constitutionality, which may be overcome by demonstrating that the legislation is arbitrary or irrational. *Turner Elkhorn*, 428 U.S. at 15, 96 S.Ct. 2882 (noting that "legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way") (citing, for example, *Ferguson v. Skrupa*, 372 U.S. 726, 83 S.Ct. 1028, 10 L.Ed.2d 93 (1963); *Williamson v. Lee Optical Inc.*, 348 U.S. 483, 487-88, 75 S.Ct. 461, 99 L.Ed. 563 (1955)). Thus, to prevail here, the Utilities must demonstrate that the Act is arbitrary and irrational as applied to them. They have carried that burden.

The special assessment was wholly retroactive: it covered only purchases of enriched uranium before the effective date of the Act. The retroactivity was severe. It reached back to the Utilities' enriched uranium purchases that occurred up to twenty-two years (or twenty-three years, in the case of Omaha District) before the Act was passed, six years after Maine Yankee had stopped purchasing government enriched uranium, and three years after Sacramento District closed its

plant. It also was substantial, subjecting the Utilities to additional charges which they assert would total $25 million, $8 million and almost $20 million for the three companies.

The Utilities did not cause or contribute to the contamination of the government's plants, which the special assessment was designed to cure, and did not benefit from it. The Utilities allege that the contamination occurred prior to the beginning of their purchases, when the plants were producing enriched uranium "almost exclusively" for the military, and that "[l]ittle, if any additional contamination" occurred thereafter. Moreover, when the Utilities entered into the purchase contracts at a fixed price, they had no reason to believe, or even suspect, that years later the government would seek to make them pay for a substantial portion of its cleanup costs. They may well have understood and expected that the government would incur substantial expenses in making that cleanup, but they reasonably would have believed that the charges the government made for the enriched uranium included the cleanup cost. They certainly had no basis to expect that they would be subject to the additional large amounts of the assessments.

To be sure, the Utilities benefited from their participation in the government's uranium enrichment program, but the plant contamination and the cost of cleaning it up arose from an earlier stage of that program (when the Utilities were not participants). For the reasons just given, however, the Utilities' participation is not a sufficient basis under the Due Process Clause to subject the Utilities to such a substantial portion of the costs of cleaning up the contamination, which they did not cause and from which they did not benefit.

B. The government contends that *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 24, 96 S.Ct. 2882, 49 L.Ed.2d 752 (1976), supports the retroactive assessment against the Utilities. *Turner Elkhorn* involved a provision of the Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 792, as

amended by the Black Lung Benefits Act of 1972, 86 Stat. 150, 30 U.S.C. § 901 *et seq.*, that required mining companies to pay death or total disability benefits to employee miners suffering from pneumoconiosis (black lung disease), as applied to miners who had stopped so working before the effective date of the Act. The disease, whose symptoms may "become apparent only after a miner has left the coal mines," *id.* at 8, 96 S.Ct. 2882, "is caused by long-term inhalation of coal dust," *id.* at 6, 96 S.Ct. 2882. The mining companies challenged this retroactive application of the Act as violating due process.

The Supreme Court upheld the Act against this challenge. The Court recognized that the legislation imposed new liability for disabilities developed prior to enactment, but concluded that such retroactivity was "justified as a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor." *Id.* at 18, 96 S.Ct. 2882. It reflected the "interlocking economic rights and duties of employers and employees," and "adjust[ed] the burdens and benefits of economic life." *Id.* at 15, 96 S.Ct. 2882. Thus, *Turner Elkhorn* held that it was not a due process violation for legislation "to satisfy a specific need created by the dangerous conditions under which the former employee labored—to allocate to the mine operator an actual, measurable cost of his business." *Id.* at 19, 96 S.Ct. 2882.

The Court, however, in sustaining the presumptions of the Coal Act relating to total disability, which were also at issue in the case, stated: "To the extent that the presumption of death due to pneumoconiosis is viewed as requiring compensation for damages resulting from death unrelated to the operator's conduct, its application to employees who terminated their employment before the Act was passed would present difficulties not encountered in our prior discussion of retroactivity. The justification we found for the retrospective application of the Act is that it serves to spread

costs in a rational manner—by allocating to the operator an actual cost of his business, the avoidance of which might be thought to have enlarged the operator's profits. The damage resulting from a miner's death that is due to causes other than the operator's conduct can hardly be termed a 'cost' of the operator's business." *Id.* at 24, 96 S.Ct. 2882; *see also Concrete Pipe and Prods. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 641, 113 S.Ct. 2264, 124 L.Ed.2d 539 (1993); *United States v. Carlton*, 512 U.S. 26, 31, 114 S.Ct. 2018, 129 L.Ed.2d 22 (1994). Thus, in *Turner Elkhorn*, the Supreme Court recognized culpability as an important factor supporting the imposition of retroactive liability.

There is a critical difference between *Turner Elkhorn* and the present case that precludes the application of *Turner Elkhorn* here. In *Turner Elkhorn* the miners' illness was caused by conditions that existed when they were working for the company, for which it was responsible and which "profited from the fruits of their labor." The company, therefore, could fairly be charged with responsibility for its former employees' condition.

In the present case, however, the contamination occurred before the government sold enriched uranium to the Utilities, which neither were responsible for nor benefited from the contamination. In these circumstances, as shown, it would be unfair and unreasonable to subject the Utilities to a substantial additional charge to cure the contamination they neither caused nor benefited from.

In many (if not most) of the cases in which the Supreme Court rejected Due Process challenges to retroactive legislation, the statute dealt with the relationships, financial and otherwise, among private parties; the government's role was only the regulation of those relationships. In the present case, however, the statute deals with the relationship between the government and private parties; it seeks to transfer to those parties a substantial portion of the government's costs of

rectifying the contamination of its plants used to produce the product it sold to those parties. It is by no means clear that those Supreme Court cases may be automatically and uncritically applied to the significantly different situation here involved.

C. The government contends that the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("Environmental Response Act"), 42 U.S.C. § 9601 *et seq.* (1994), supports the validity under the Due Process Clause of the retroactive assessment of clean-up costs on the Utilities. Among other things, that Act provides for the clean-up of inactive hazardous waste disposal sites and established a Hazardous Substances Response Trust Fund ("Superfund") to pay for it. The Superfund was funded initially, and in large part, by special taxes on certain petroleum products and chemicals and was to be replenished by assessments on persons responsible for the waste. Hazardous Substance Response Revenue Act of 1980, Title II, Subtitle A §§ 4611, 4661, Title II, Subtitle B, § 221, 26 U.S.C. §§ 4611, 4661, 42 U.S.C. § 9631. The government used the Superfund to fund the clean-up and replenished the cost by charging the persons responsible for the hazardous waste. 42 U.S.C. §§ 9604(a)(1), 9607. Such responsible persons include those involved in the cleanup work, including "the owner and operator of . . . a facility," anyone who at the time of disposal "owned or operated any facility at which such hazardous substances were disposed of," anyone who arranged for or participated in the "transport for disposal or treatment, of hazardous substances" and anyone who "accepted any hazardous substances for transport to disposal treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance." 42 U.S.C. § 9607(a).

The Environmental Response Act thus retroactively imposes liability on numerous persons for cleanup of pre-enactment contamination.

The government cites two Court of Appeals cases that upheld the retroactive application of the Environmental Response Act against Due Process challenges to its constitutionality, as support for the constitutionality of the retroactive assessment against the Utilities. *United States v. Northeastern Pharm. & Chem. Co.*, 810 F.2d 726 (8th Cir.1986), held liable for cleanup costs individuals who arranged for the transportation and dumping of hazardous waste before the effective date of the Act. In *United States v. Monsanto Co.*, 858 F.2d 160, 174 (4th Cir.1988), the court ruled that retroactive application of the Environmental Response Act did not violate due process as applied to (1) landowners who leased their property to a company that stored hazardous waste on the land and (2) the companies that generated the waste but which contracted with another waste-handling business, which provided transportation, recycling and disposal of chemical waste. Noting that the companies that generated the waste profited from inexpensive waste disposal methods that may have been technically legal prior to the [Environmental Response Act]'s enactment, it was certainly foreseeable at the time that improper disposal could cause enormous damage to the environment. [The Environmental Response Act] operates remedially to spread the costs of responding to improper waste disposal among all parties that played a role in creating the hazardous conditions. . . . [T]he retroactive application of [the Environmental Response Act] does not violate due process. *Id.* at 174 (citations omitted).

In the present case, however, the Utilities did not participate in any way, directly or indirectly, or play any role in, the creation of the hazardous conditions at the government's uranium facilities. The Utilities merely purchased enriched uranium after the contamination had occurred, long

before the passage of the Energy Act. The Utilities' tangential connection with the contamination of the government's uranium enrichment facilities is quite different from the relationships to the hazardous waste disposal of the persons held constitutionally liable under the Environmental Response Act.

D. The government also contends that because 42 U.S.C. § 2297g-1(g) provides that the assessments "shall be deemed a necessary and reasonable current cost of fuel and shall be fully recoverable in rates in all jurisdictions in the same manner as the utility's other fuel cost," the Utilities will be able to pass the assessments on to their customers, and that the assessments, therefore, will not have any substantial economic impact on them.

It is impossible to predict, however, to what extent (if any) state and local regulatory agencies and courts would permit the Utilities to treat the assessments as a "current cost of fuel" in determining their rates. The question whether § 2297g-1(g) preempts state regulatory authority in this area appears difficult. The power of Congress to require that particular items be included in the Utilities' costs for rate making purposes is uncertain. Regulation of retail electric power rates is a traditional function of state government. The likelihood of the state action that the government envisions is far too speculative and conjectural to constitute a valid basis for upholding the assessments.

In any event, the question whether, and to what extent, the state regulatory agencies and courts will recognize the assessment as part of the Utilities' costs for rate making purposes appears more appropriately an issue for the damages phase of these cases than for the liability phase.

E. In sum, I conclude that the Utilities' complaints have stated a valid claim under the Due Process Clause, and that the Court of Federal Claims erred in dismissing the complaints for failure to state a claim upon which relief could be granted.

APPENDIX B

UNITED STATES COURT OF FEDERAL CLAIMS

[Filed: July 26, 1999]

No. 96-616 C

OMAHA PUBLIC POWER DISTRICT,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

OPINION

WIESE, *Judge*.

In the Energy Policy Act of 1992, Pub.L. No. 102-486, 106 Stat. 2776 (codified as amended in various sections of 42 U.S.C.), Congress directed the collection of a special fee from all domestic electric utility companies that previously had purchased enriched uranium from the Government for the generation of electrical energy. The fee, which is to remain in effect for fifteen years following the Act's enactment or until $2.5 billion has been collected, is deposited into a special fund, the Uranium Decontamination and Decommissioning Fund (the "D & D Fund"), to be used to meet the clean-up costs of the Government facilities where the uranium enrichment activities were carried out.

The lawfulness of this fee was the subject of a legal challenge in *Yankee Atomic Elec. Co. v. United States*, 112 F.3d 1569 (Fed.Cir.1997), *rev'g* 33 Fed.Cl. 580 (1995), *cert. denied* 524 U.S. 951, 118 S.Ct. 2365, 141 L.Ed.2d 735 (1998). In that case, a similarly-situated plaintiff argued that the Government's imposition of the fee violated the

fixed-price character of the contracts under which the enriched uranium had been sold to the utility companies. While the trial court initially accepted the plaintiff's argument, the Federal Circuit reversed, holding that the fee constituted "a general exercise of Congress's taxing power for the purpose of addressing a societal problem rather than an act that retroactively increases the price charged to contracting parties for uranium enrichment services." *Id.* at 1577.

The same fee is once again brought under attack in this case. The arguments we encounter now are that the imposition of the fee amounts to an unconstitutional taking of property, a violation of substantive due process and a denial of equal protection.

The Government has moved to dismiss for failure to state a claim on which relief can be granted. Plaintiffs oppose.[1] The parties have filed extensive briefs and oral argument was heard on May 18, 1999. We now decide in defendant's favor.

FACTS

Beginning in the 1940s, the Government, acting originally through the Atomic Energy Commission and later through the Department of Energy (DOE), owned and operated a number of uranium enrichment facilities as part of the national defense program. For almost 25 years, most of the uranium produced at these plants—approximately 96%—was used solely for national defense purposes. In the mid-1960s, however, the Government decided to make its enrichment services available to commercial customers, a decision that

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[1] Although their cases have not been formally consolidated, the actions filed by Maine Yankee Atomic Power Company, docket number 97-28C, Sacramento Municipal Utility District, docket number 95-823C, and Omaha Public Power District, docket number 96-616C, present nearly identical issues that were briefed and argued together. Accordingly, this opinion speaks to all three claims.

was implemented by entering into a series of contracts with various public utilities permitting their purchase of enriched uranium for the generation of electricity. In the main, these contracts provided for the sale of uranium at a fixed price, determined according to prevailing rates established by the Commission at the time the service was provided.

In the early 1990s, following nearly fifty years of uranium enrichment activity, Congress decided to privatize its enrichment facilities by creating a new, for-profit, governmental corporation called the United States Enrichment Corporation ("USEC"). Under the Energy Policy Act of 1992, USEC was to assume operational control of the enrichment facilities, with the goal of ultimately selling the facilities to private investors. DOE, concerned that the cost of decontaminating the plants would stand as an obstacle to attracting private investment, lobbied Congress to exempt USEC from all clean-up-cost liability. Congress agreed, specifying that all pre-enactment liabilities—including the cost of decontaminating and decommissioning the plants—would remain the responsibility of DOE.

As part of the Energy Policy Act, then, Congress established the Uranium Enrichment Decontamination and Decommissioning Fund to pay for the clean-up of the government-owned enrichment facilities. The Act specified that a portion of the clean-up costs—specifically $330 million annually, or 68% of the required amount—would be contributed by Congress from appropriated funds. The remaining third, a figure not to exceed $2.5 billion, would be collected in up to $150 million annual installments over a fifteen-year period from those domestic utility companies that had earlier used government-enriched uranium in the generation of electricity. 42 U.S.C.A. § 2297g-1 (West 1994 & Supp.1999). The utilities' portion was subject to annual and aggregate caps, with Congress, by statute, obligated to make up the difference.

Three aspects of the D & D Fund are, from plaintiffs' perspective, worthy of note. First, the fee imposed by the Energy Policy Act applies only to the end-users of the uranium. Thus, a utility that had contracted with the Government for the purchase of uranium but then had resold the uranium to another utility would not be subject to the fee. As a result, the list of utilities responsible for the fee is strikingly similar to, but not entirely coincident with, the list of utilities that had contracted with the Government. Second, the special assessments are imposed only on those utilities that purchased government-enriched uranium prior to the Energy Policy Act's 1992 enactment, and thus do not apply to domestic customers who purchased USEC services any time after 1992. Finally, the Act specifies that foreign utilities, despite having represented 25% of DOE's pre-1992 commercial customer base, are not subject to the fee.

Under the Act, the fee itself is based on the percentage of uranium enrichment work units each utility had previously purchased from the Department of Energy, relative to the total number of work units produced by DOE over the life of the enrichment facilities. That contribution scheme—apportion-ing liability for the fee on the basis of pro-rata consumption of uranium—was first challenged in *Yankee Atomic*, 112 F.3d 1569 as a violation of the utilities' fixed-price contracts for the purchase of uranium.

The Federal Circuit, as we earlier noted, rejected Yankee Atomic's claim that the Energy Policy Act impermissibly raised the price of uranium in breach of the parties' fixed-price contracts with the Government. Characterizing the fee as a "general exercise of Congress's taxing power," the Federal Circuit concluded that the assessment was "not a deliberate retroactive increase in the price of those contracts," but was instead "the Government's way of spreading the costs of the later discovered decontamination and decommissioning problem on all utilities that benefited from the Government's service." *Id.* at 1577, 1580.

The plaintiffs now before this court—Maine Yankee Atomic Power Company, Sacramento Municipal Utility District and Omaha Public Power District—each signed enrichment contracts with the Government which, in their original form, were largely identical to the contracts between Yankee Atomic and the Government.[2] As a result of the uranium purchases made under those contracts, plaintiffs, like Yankee Atomic, have been subject to the assessment outlined in the Energy Policy Act. As of the date of suit in this court, Omaha Public Power District had paid approx-imately $7.4 million of the $19 million it is projected to owe under the Energy Policy Act for purchases of uranium made from 1969 until 1992; Maine Yankee Atomic Power Company had paid $9,815,718.57 of its estimated $25 million liability on uranium purchases from 1970 until 1986; and Sacramento Municipal Utility District had paid more than $5.8 million of its projected $8 million liability for uranium purchased from 1969 until 1981. Of the three utilities, only one—Maine Yankee—has abandoned the electricity gener-ating business entirely, closing down its sole electricity generating facility permanently in 1996.

DISCUSSION

In the first count of their amended complaints,[3] plaintiffs assert that the imposition of a monetary liability which is both

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[2] Omaha Public Power maintains that the Utility Services Contract and the Supplemental Agreement of Settlement it signed in 1984 (terminating all existing uranium contracts and providing that "all obligations arising under [its then existing] contract shall be deemed to be concluded") differentiates its contract from the contracts at issue in *Yankee Atomic*. We address this contention later in this opinion.

[3] The claims now before us were pending, but stayed, while the parallel claim in *Yankee Atomic* was proceeding before the trial and appellate courts. In light of the decision in *Yankee Atomic*, plaintiffs filed amended complaints in which they essentially have distanced themselves from their earlier contract-based theories. Plaintiffs attempt now to move forward under the theories set forth in *Eastern Enterprises v. Apfel*, 524 U.S. 498,

retroactive and unconnected to their past conduct deprives them of property rights in violation of the Takings Clause of the Fifth Amendment. The second count sets forth a due process claim based on similar contentions—that the assessment is unconstitutional to the extent that it imposes on plaintiffs a severe, disproportionate and extremely retroactive liability. Plaintiffs' third and final count alleges a taking and/or breach of plaintiffs' contract- based rights.

Defendant, in turn, has moved to dismiss plaintiffs' claims. It contends first that plaintiffs' takings and due process arguments were considered and rejected by the Federal Circuit in *Yankee Atomic* and, under the principle of *stare decisis*, should not be revisited. Second, defendant argues that the holding in *Eastern Enterprises v. Apfel*, 524 U.S. 498, 118 S.Ct. 2131, 141 L.Ed.2d 451 (1998), striking down as unconstitutional the imposition of a severely retroactive liability on a party that had no reason to anticipate the liability and whose experience was not commensurate with the burden later imposed, is not dispositive of the issues before us. Finally, defendant maintains that even under the traditional tenets of due process and takings law, plaintiffs' claims must fail. We address those arguments in turn.

I. *Stare Decisis*

In urging us to apply the doctrine of *stare decisis*, defendant argues that the *Yankee Atomic* ruling, upholding the assessment on the grounds that it constitutes a general tax falling proportionally on those utilities that had benefited from the Government's services, disposes of the issues now before us. While we agree that the *Yankee Atomic* decision goes a long way in addressing plaintiffs' present arguments, we are unconvinced, however, that the decision forecloses

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118 S.Ct. 2131, 141 L.Ed.2d 451 (1998), specifically that a retroactive imposition of liability may, in certain circumstances, constitute a violation either of the Takings Clause or Due Process Clause of the Fifth Amendment.

plaintiffs' takings and due process claims. Only to the extent that plaintiffs now attempt to maintain contract-based claims —an issue argued before, and rejected by, the Federal Circuit in *Yankee Atomic*—do we find the doctrine of *stare decisis* to be applicable.

In reaching this conclusion, we begin with a fundamental principle of *stare decisis:* in order for an issue of law to be seen as settled, and hence binding, it must have been both heard and decided by an earlier court. 18 James Wm. Moore et al., Moore's Federal Practice § 134.04 [2] (3d ed.1998). *Stare decisis* applies "only to legal issues that were actually decided in a prior action" and not to those which were neither "litigated [n]or resolved." *Beacon Oil Co. v. O'Leary*, 71 F.3d 391, 395 (Fed.Cir.1995). In addition, a case will not be treated as binding precedent on a point of law where the holding is only implicit or assumed in the decision but is not announced. *United States v. L.A. Tucker Truck Lines*, 344 U.S. 33, 38, 73 S.Ct. 67, 97 L.Ed. 54 (1952).

Two obstacles prevent us from invoking the doctrine of *stare decisis*. As an initial matter, we do not believe the *Yankee Atomic* decision explicitly rules on, nor even squarely addresses, plaintiffs' takings or due process arguments. As we discuss below, the takings and due process claims put forth by Yankee Atomic differ in crucial respects from the takings and due process claims now before this court. In addition, the Supreme Court's opinion in *Eastern Enterprises* —issued after the *Yankee Atomic* decision—adds a new perspective to the issues at hand. To the extent that the decision must guide our own thinking, we are not prepared to conclude that the decision would in no way have shaped the Federal Circuit's thinking in *Yankee Atomic* as well. And it is this subtle shift in legal thought we are now bound to explore.

Considering first the scope of the *Yankee Atomic* decision, we note that while the Government is correct in asserting that the *Yankee Atomic* court considered both due process and

takings challenges to the Energy Policy Act assessment, it considered only a single aspect of those challenges: whether the contract rights, establishing a fixed price for government-provided enrichment services, had been taken or otherwise violated. The court was not asked to address, nor did it consider, whether the assessment, properly treated as a tax, met the standards of takings and due process law as applied simply to governmental demands for money.

Indeed, the takings claim that was presented and briefed in *Yankee Atomic* was the taking of a contract right. The trial court explicitly characterized the assessment as a revision in contract price, and held the assessment unconstitutional on the grounds that it deprived Yankee Atomic of the economic benefit provided by the contract. To the extent that a taking or, in the words of the trial court, an illegal exaction, had occurred, the illegality was specifically predicated on a violation of contract-based rights.

The contract-based approach to the problem continued at the appellate level: "The decision of the Court of Federal Claims is driven by its characterization of the special assessment as a retroactive price increase rather than an exercise of the sovereign's taxing power, and the parties' dispute over this characterization frames the dispositive issue of this appeal." *Yankee Atomic*, 112 F.3d at 1573. However, in focusing on what the assessment was not—an impermissible infringement on *contract* rights—the Federal Circuit was not required to explore the full dimensions of what it concluded the assessment in fact was—the imposition of a tax. Accordingly, the court made no explicit findings with regard to whether money, rather than contract rights, had indeed been taken.

Similarly, while the alleged retroactivity of the fee was a feature of the *Yankee Atomic* case, it was not, either in the arguments before the court or in the court's decision, treated as a true factor in assessing the fee's constitutionality. To the

extent that due process or takings issues were addressed, the focus remained on the Government's action as it affected contract rights, not as a limitation on the Government's power to tax. "Regardless of whether the situation is characterized as a breach of contract, an unlawful taking, or an unlawful exaction, the arguments stem from Yankee Atomic's prior contracts with the Government." *Id.* at 1574 n. 2. *Yankee Atomic* thus offers us no guidance as to what restrictions on the Government's taxing power takings law or due process may in fact impose.

In assessing the applicability of *stare decisis*, then, we must ask ourselves whether we can be assured that *Yankee Atomic* answered, in a deliberate fashion, the questions plaintiffs raise here: whether, independent of any contract right, the special assessment imposed by the Energy Policy Act amounted to a taking of plaintiffs' money; whether the liability itself was so retroactive, so divorced from plaintiffs' experiences and so contrary to their expectations that it violated due process. These questions, we believe, were not answered.

With regard to plaintiffs' contract-based claims,[4] however, we find *Yankee Atomic* to be dispositive. In determining that the assessment constituted an exercise of general taxation apart from, and wholly independent of, the parties' earlier contractual relationship, the Federal Circuit rejected the contention that the assessment amounted to an impermissible infringement on the plaintiff's contract-based rights. This court, in turn, is bound by that ruling.

Nor do the additional contract documents put forth by Omaha Public Power District change that result. We see nothing in the Utility Services Contract or the 1984 Supplemental Agreement to differentiate it from the contract that was at issue in *Yankee Atomic*. And to the extent that the

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[4] With the exception of Omaha Public Power District, plaintiffs concede the preclusive effect of *Yankee Atomic* and reiterate their contract claims merely to preserve the issue for appeal.

fixed-price terms of the contract were held by the Federal Circuit not to constitute an unmistakable promise, no additional terms in the Supplemental Agreement satisfy that unmistakability requirement. The unmistakability doctrine—a principle which dictates that immunity from future legislation (here, a tax) be clearly, unmistakably incorporated into a contract with the Government in order to be enforced—requires more than the generic statements embodied in the Supplemental Agreement or the extra-contractual assurances by Government officials allegedly made to Omaha.

II. The *Eastern Enterprises* Decision

A. The Essential Ruling

Moving forward, then, with plaintiffs' due process and takings claims, we begin with the contentions that the Energy Policy Act assessment impermissibly imposes financial liability on parties not responsible for the problem that the legislation addresses, and is based on conduct excessively far in the past. As evidence of those two propositions, plaintiffs point first to testimony offered before a congressional subcommittee to the effect that it was the use of the enrichment facilities by the U.S. military that alone contaminated the plants, and that the subsequent enrichment of uranium for commercial purposes added no additional contamination.[5] Plaintiffs additionally point to the fact that the fees levied are based, in some instances, on purchases of uranium that occurred some twenty-three years before the passage of the Energy Policy Act.

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[5] *See*, for instance, *Department of Energy Budget Request for Fiscal Year 1993: Oversight Hearing before the Subcommittee on Energy and the Environment of the Committee on Interior and Insular Affairs*, 102d Cong., 2d Sess. at 79 (Feb. 28, 1992) (statement of William H. Young, Assistant Secretary for Nuclear Energy, United States Department of Energy) (acknowledging that "the contamination that was placed on the systems and structures occurred during that 20-year period that it was operated for the government").

Plaintiffs' orientation to the present problem is shaped in large part by the holding in *Eastern Enterprises*, 524 U.S. 498, 118 S.Ct. 2131, 141 L.Ed.2d 451—a decision defendant maintains is inapplicable to the facts at hand. In *Eastern Enterprises*, a coal mining company challenged the Coal Industry Retiree Health Benefit Act of 1992 (the Coal Act), charging that the act was unconstitutional as applied to it. The Coal Act obligated Eastern to pay premiums, beginning in 1992, to cover health care benefits for former employees who had worked for Eastern prior to 1966, despite the fact that Eastern itself had ceased its mining operations in 1965. Central to the Supreme Court's analysis was the fact that, of the various bargaining agreements signed by the coal industry throughout the years, only those agreements reached after 1965—*i.e.*, those in which Eastern Enterprises had not participated—contained explicit reference to, or fostered expectations of, lifetime health benefits.

A four-justice plurality held that the assessment, reaching back more than thirty years and unrelated to the company's experience with the health-care plans, violated the Takings Clause. One justice, concurring in the result, rejected the applicability of the Takings Clause, but reached his conclusion based on due process grounds. In contrast, a four-justice dissent concluded that the Takings Clause was inapplicable, and that due process had not been violated.

It is the fractured nature of that decision which defendant believes limits its holding. This court need not apply a takings analysis, defendant maintains, since a majority of the Court—the four dissenters along with Justice Kennedy in his concurrence [6]—explicitly rejects the applicability of the

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[6] The dissent rejected the plurality's takings analysis on the ground that the case involved "not an interest in physical or intellectual property, but an ordinary liability to pay money, and not to the Government, but to third parties." *Eastern Enterprises*, 524 U.S. at ___, 118 S.Ct. at 2162 (Breyer, J., dissenting). Justice Kennedy, writing in concurrence, further cautioned

Takings Clause to "an ordinary liability to pay money." *Eastern Enterprises*, 524 U.S. at ___, 118 S.Ct. at 2162 (Breyer, J., dissenting). And in the absence of *Eastern Enterprises*, defendant contends, prevailing case law would only require the act to meet a standard of rationality in order to withstand a constitutional challenge.

While we recognize that the takings analysis employed by the plurality in *Eastern Enterprises* does not necessarily reflect the approach advocated by the remaining members of the Court, we are nonetheless mindful of the D.C. Circuit's observation that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court must be viewed as that position taken by those members who concurred in the judgments on the narrowest grounds.'" *King v. Palmer*, 950 F.2d 771, 783 (D.C.Cir.1991) (quoting *Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977)) (emphasis omitted).

If *Eastern Enterprises* does not stand for a single, distinct approach to the problem before it, it nonetheless stands for a clear principle: a liability that is severely retroactive, disruptive of settled expectations and wholly divorced from a party's experience may not constitutionally be imposed. We draw that conclusion from the language offered both by the plurality and by the concurrence. The plurality pointed out that Supreme Court decisions "have left open the possibility that legislation might be unconstitutional if it imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is

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that "[t]he plurality's opinion disregards this requirement [that a specific property right or interest be at stake] and, by removing this constant characteristic from takings analysis, would expand an already difficult and uncertain rule to a vast category of cases not deemed, in our law, to implicate the Takings Clause." *Id.* at ___, 118 S.Ct. at 2155 (Kennedy, J., concurring).

substantially disproportionate to the parties' experience." *Eastern Enterprises*, 524 U.S. at ___, 118 S.Ct. at 2149. The plurality then went on to criticize the assessment as "not calibrated either to Eastern's past actions or to any agreement—implicit or otherwise—by the company," rejecting the liability on the grounds that it was "substantial in amount, based on the employer's conduct far in the past, and unrelated to any commitment that the employers made or to any injury they caused." *Id.* at ___, 118 S.Ct. at 2153. Similarly, Justice Kennedy, in his concurrence, looked to the "degree of retroactive effect" as a "significant determinant" in assessing a statute's constitutionality. *Eastern Enterprises*, 524 U.S. at ___, 118 S.Ct. at 2159 (Kennedy, J., concurring). Noting that the retroactivity in *Eastern* was of "unprecedented scope," he concluded that, to the extent that Eastern was responsible neither for the miners' expectations of life-long health benefits nor for the benefit plan's fiscal instability, it could not constitutionally be made to bear the burden imposed by the Coal Act. *Id.*

The *Eastern Enterprises* test thus asks us to look more broadly—whether through the lens of takings or due process—at the equity of imposing retroactive liability if the length of the retroactivity is great and the party's experience with the underlying problem inconsequential.

B. The Ruling Applied

In examining the factors which unified the plurality and the concurrence in *Eastern Enterprises*, we begin first with the magnitude of the retroactivity. Plaintiffs urge us to measure the length of retroactivity from the time the utilities first purchased uranium from the Government, on the grounds that the assessment changes the consequences of transactions dating back to those years. By plaintiffs' calculations, the assessment taxes Omaha and Sacramento on purchases made twenty-three years before the statute's enactment, and Maine-Yankee on purchases made twenty-two years before that date.

i. Retroactivity

While at first glance the length of time appears to rival the thirty to fifty-year period found objectionable in *Eastern Enterprises,* those numbers belie an important distinction: Eastern Enterprises had left the coal business almost thirty years before the Coal Act's passage, and was no longer a member of the industry either at the time the expectation of lifetime benefits was fostered or at the time the existing benefit fund became unstable. Plaintiffs, in contrast, continued to participate in the uranium enrichment field, in at least one instance, up until the date of the Energy Policy Act's passage [7] and had, by definition, contemporaneous exposure to the process (*i.e.*, the enrichment) which created the problem. While the import of that distinction may not be immediately obvious, it goes to the heart of the case against retroactive law-making. The objection to retroactivity is not simply that a transaction is "reopened," but that legitimate, long-settled expectations are themselves disrupted. Put simply, retroactivity most offends when dealings an individual reasonably views as both completed and long-past are, without legitimate justification, again called into account. We explain further.

To the extent that Eastern had left the coal business entirely and had done so at a time when the driving forces behind the Coal Act—the miner's expectations of lifetime benefits and the instability of the benefit fund—had yet to come into existence, it could reasonably have concluded that its dealings in the coal industry were complete. The *Eastern Enterprises* decision taught in part that such thirty-year-old expectations

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[7] Omaha Public Power District continued to purchase government-enriched uranium until 1992; Maine Yankee until 1986 and Sacramento Municipal Utility District until 1981. In the case of Sacramento, however, its contracts with the Government continued until 1990 even though it had exercised opt-out provisions to permit its purchase of uranium from other sources.

should not be lightly undone. Plaintiffs' situation offers no parallel: unlike Eastern, they did not leave the industry decades before the imposition of liability, nor were they charged with remedying a problem that was still to be recognized at the time they completed the conduct on which their liability was later to be based. Plaintiffs, still purchasing uranium well into the 1980s and 1990s (and presumably aware, at least in a general sense, of the problem of contamination), could not reasonably have harbored the same sense of closure with regard to those transactions as did the plaintiff in *Eastern Enterprises*.

The Energy Policy Act's retroactive effect extends, at most, for less than a decade, though we see no need actually to quantify that period. As intimated above, what concerns us is not the length of the period per se--one could hardly maintain, for instance, that an eleven-year reach-back is unacceptable while a nine-year reach-back passes muster—but the reasons for the retroactivity and the retroactivity's effect. *Eastern Enterprises* teaches that, even in the face of severe retroactivity (not, we believe, the present situation), the extent of a statute's retroactivity is not the only factor to be considered in determining the legislation's constitutionality. We turn then to the other factors.

ii. Proportionality—Present Burden and Past Conduct

Significant also to the *Eastern Enterprises* analysis was the fact that Eastern had no reason to anticipate the liability imposed on it, and its burden was substantially disproportionate to its experience. Focusing on the proportionality of the current plaintiffs' burden to their experience, we make two general but crucial observations: the plaintiffs' burden, ultimately, was small, and its experience—at least for the purposes of assigning liability—was great. We explore those conclusions further.

With regard to the magnitude of the liability, we begin with the point that a lion's share of the expense for the clean-up—some 68%—is to be funded by Congress through public appropriations. The utilities, from the beginning, were slated only to shoulder less than a third of the total costs. In addition, the Energy Policy Act contains a specific pass-through mechanism, designed to ensure that the utilities' present customers, rather than the utilities themselves, bear the ultimate expense of the assessment.[8] That amount, spread over a wide customer base and included as a present cost of fuel, is a far less substantial burden—either on the utilities or on its customers—than the one challenged in *Eastern Enterprises*.

Turning next to the experience criterion, we note first that the calculation of liability was not, in the words of the Supreme Court "made in a vacuum." *Eastern Enterprises*, 524 U.S. at ___, 118 S.Ct. at 2150 (quoting *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 225, 106 S.Ct. 1018, 89 L.Ed.2d 166 (1986)). The assessments are based on each utility's pro rata consumption of uranium—a method which explicitly allocates liability in direct proportion to the amount of uranium received and used. In that respect, then, the assessment is exactly as the Federal Circuit described it in *Yankee Atomic:* "a general tax that falls proportionally on all utilities that benefited from the DOE's uranium enrichment services." *Yankee Atomic*, 112 F.3d at 1575. And as the Federal Circuit there recognized, "the costs of large, unrecognized societal problems are frequently spread among those who benefited from the source of the problem." *Id.* at 1576 n. 6.

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[8] 42 U.S.C. § 2297g-1(g), titled "Treatment of assessment" provides that "[a]ny special assessment levied under this section . . . shall be deemed a necessary and reasonable current cost of fuel and shall be fully recoverable in rates in all jurisdictions in the same manner as the utility's other fuel costs."

Plaintiffs object to that justification on the grounds that it was the U.S. military—rather than they—who allegedly caused the contamination of the enrichment facilities. Yet even if we were to accept plaintiffs' contention that the uranium sold to plaintiffs caused *no* additional contamination (as indeed we must for the purposes of this motion), we nonetheless conclude that plaintiffs received a benefit—i.e., the enriched uranium—made possible only through the prior contamination of the plants. Thus, plaintiffs' situation readily accommodates itself to the observation noted by the Supreme Court in *United States v. Sperry Corp.*, 493 U.S. 52, 65, 110 S.Ct. 387, 107 L.Ed.2d 290 (1989) that "[i]t is surely proper for Congress to legislate retrospectively to ensure that costs of a program are borne by the entire class of persons that Congress rationally believes should bear them."

Plaintiffs respond that, to the extent that the enrichment services represented a benefit, it was a benefit for which they had already paid in full through their contract price. Yet, as discussed in *Yankee Atomic*, the assessment does not represent an increase in contract price, but rather the imposition of liability to remedy a social ill. *Yankee Atomic*, 112 F.3d at 1575. And the fact that the contamination—a partial legacy of plaintiffs' dealings with the Government—exists, necessarily means that there remain unpaid social costs of those transactions. That plaintiffs could have purchased their uranium elsewhere (and, as with Sacramento, did in fact do so) [9] is beside the point. The contamination clean-up is an "actual, measurable cost of [the] business" in which plaintiffs

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[9] As a result of competition from foreign uranium suppliers, including facilities in France, Canada, Italy, Russia, China, India and England, the Government's share of the enrichment market declined from almost 100% in the 1960s and 1970s to less than 50% in 1983. When foreign suppliers offered lower prices—specifically in 1984, 1985, 1987, 1988 and 1990—Sacramento elected not to exercise its contract right to purchase uranium from the Government in those years.

chose to participate. *Eastern Enterprises*, 524 U.S. at ___, 118 S.Ct. at 2159 (quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 19, 96 S.Ct. 2882, 49 L.Ed.2d 752 (1976)).

The question whether plaintiffs could have anticipated the liability is an inquiry closely related, if not identical, to the considerations which underpin our concerns about retroactivity and experience. Retroactivity is largely objectionable, for instance, to the extent it cannot be anticipated (with all the concomitant issues such lack of notice engenders), and a close experiential connection between the burdened party and the fee imposed necessarily means that the liability should have been anticipated. While we discuss below—in our assessment of the reasonableness of their investment-backed expectations—the extent to which plaintiffs might have anticipated their Energy Policy Act liability, we note only that plaintiffs' participation in so highly regulated a field and their receipt of benefit from that field should each have served as notice of a possible future obligation. Heavy industry regulation of the sort seen in the nuclear industry means that few legislative changes can truly be seen as wholly unanticipated. *Atlas Corp. v. United States*, 895 F.2d 745, 758 (Fed.Cir.1990). And, as a more general matter, those who create a burden for society or who benefit from a burden's creation must be seen as implicitly accepting responsibility and possessing constructive knowledge that they may one day be called to account.

Thus, none of the factors found crucial in *Eastern Enterprises*—the length of the retroactivity, the unforeseen nature of the assessment or the disconnect between Eastern's conduct and its resulting liability, militate against a finding of constitutionality in the present case. In short, the assessment is not an unlawful exaction.

III. The Energy Policy Act as a Taking

In spite of the divided nature of the *Eastern Enterprises* decision, however, plaintiffs nonetheless urge us to apply the plurality's takings analysis to find that the Energy Policy assessment constitutes a compensable taking of plaintiffs' property. Yet, despite our reservations about that approach, we conclude that even when viewed through a traditional takings analysis, plaintiffs' claim must fail. None of the factors cited in *Eastern Enterprises*—the economic impact of the legislation, the reasonableness of plaintiffs' investment-backed expectations and the character of the government action—support the finding of a taking of property. We explain further.

As discussed above, the magnitude of the liability imposed on plaintiffs is sharply diminished by their ability to pass through the costs to their customers. 42 U.S.C. § 2297g-1(g).[10] The fact that the tax burden falls, as Sacramento acknowledges, on Sacramento's "current and future ratepayers," necessarily means that the economic impact on Sacramento—limited perhaps to incidental costs of collection—is slight. Thus, plaintiffs cannot show "any deprivation significant enough to satisfy the heavy burden placed upon one alleging a regulatory taking." *Keystone Bituminous Coal Assn. v. De Benedictis*, 480 U.S. 470, 493, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987).[11]

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[10] *Hughes Communications Galaxy, Inc. v. United States*, 38 Fed.Cl. 578 (1997), a case provided to us by plaintiffs, does not reach a contrary result. There, the court concluded in a breach of contract action that the contractor's ability to receive indemnification from third parties in no way affected the measure of the damages resulting from the Government's breach. Such reasoning has no application in the takings context, where the ability to pass on a cost speaks not to the measure of damages, but to the economic impact of the challenged action.

[11] The fact that Maine Yankee ceased its operations in 1996 and presumably can no longer pass on the fee to its customers does not change

As to their investment-backed expectations, plaintiffs offer a host of reasons why they reasonably did not expect to be subject to the fee in question: the fixed-price nature of their original contracts; the supplemental agreements of settlement signed by Sacramento & Omaha purporting to settle all claims; the statutory requirement that the prices as originally set be sufficient to recover all costs; the settled expectations of twenty-two year's time; and the Government's sole possession and control of the enrichment facilities.

What that assessment overlooks, however, is the benefit conferred on plaintiffs as a byproduct of the contamination's creation. Retroactive legislation is most suspect when it deprives citizens of legitimate expectations. But legitimate expectations cannot include an expectation of immunity from legislation that imposes additional costs on activities from which the plaintiff derived a prior benefit. As the Federal Circuit has pointed out, a commercial expectation, harbored in a field as regulated as the nuclear industry, that a company will not have to "spend its own money to remediate health and environmental hazards created by its own production of uranium" is simply unreasonable. *Atlas*, 895 F.2d at 758.

In assessing the nature of the government action, the court in *Eastern Enterprises* concluded that the liability was "quite unusual" as it "singles out certain employers to bear a burden that is substantial in amount, based on the employer's conduct far in the past, and unrelated to any commitment that the employers made or to any injury they caused. . . ." *Eastern Enterprises*, 524 U.S. at ___, 118 S.Ct. at 2153. But while

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the analysis. Maine Yankee was in business at the time of the Energy Policy Act's passage, meaning that it, like the other domestic utilities to which the act applied, was intended—and able—to pass on those costs. That Maine Yankee later chose to leave the industry, fully aware of its existing obligations, cannot transform either the character of the government action or the economic impact of the Act as it was originally imposed.

plaintiffs make much of the fact that, according to the Government's own account, the contamination occurred during the twenty years the facilities were operated solely for governmental purposes, we do not find that factor dispositive. All indicators point to the fact that Congress, confronted with a hazard created by uranium enrichment, looked for partial contribution from those who created the demand for the uranium.

Ultimately, it is that determination which most sways us. Whether we analyze the assessment under the Due Process Clause, under the Takings Clause, or under some amalgam of the two, we are, in the end, faced with a single, basic question: Is it inherently unfair, unjust, or irrational for Congress, when faced with costs resulting from the enrichment of uranium, to ask those parties who received the uranium to contribute to the solution? The answer, quite clearly, is no. Plaintiffs' assessments are directly proportional to their usage of uranium enrichment services—the very services which created the contamination. Congress itself took responsibility for more than two thirds of the clean-up costs and assigned the rest, as a general tax, to the rate- payers in districts which had previously benefited from nuclear power. Such a scheme can hardly be construed as beyond the reach of fairness or rationality. Accordingly, we are bound to conclude there has been no taking here.

IV. Equal Protection

Although the Energy Policy assessment comports, in our view, with both takings law and due process, plaintiffs nonetheless argue that the fee constitutes a violation of equal protection. According to plaintiffs, the fact that foreign utilities were exempted from the assessment impermissibly differentiates between similarly-situated entities—i.e., all those that had consumed government-enriched uranium. In addition, plaintiffs contend, the Act draws an illegitimate

distinction between purchasers who resold the uranium, and those who kept it for their own purposes, as well as between pre-1992 consumers (who are subject to the fee) and post-1992 consumers (who are exempt).

The short answer to plaintiffs' objection is that the drawing of such categories neither implicates nor violates the 14th Amendment. With regard to Congress's decision to exempt foreign utilities from liability, we refer to the Supreme Court's observation in *Barclay & Co. v. Edwards,* 267 U.S. 442, 451, 45 S.Ct. 135, 69 L.Ed. 703 (1924) that "[c]onsiderations of policy toward foreign countries may very well justify an exemption of the foreign corporations from taxes that might legitimately be imposed on them, but which Congress does not think it wise to exact." In addition, we think it significant that, as defendant points out in its motion to dismiss, the exclusion of foreign utilities from the liability equation in no way increases or otherwise affects plaintiffs' portion of domestic utility usage.

Similarly, legislatures need not burden the most responsible party to survive rational basis review. *Association of Bituminous Contractors, Inc. v. Apfel*, 156 F.3d 1246, 1255-56 (D.C.Cir.1998). While the original purchasers of uranium (those who resold it and were therefore exempt from assessment) may seem, to plaintiffs, equally to have benefited from the enrichment services, we cannot conclude that Congress's decision to target end-users was without rational basis. And although plaintiffs may have preferred a system under which USEC's post-1992 customers likewise picked up the tab, Congress's assignment of liability for a past problem to past consumers does not stretch the limits of the reasonable.

Accordingly, plaintiffs' equal protection challenge, like its takings and due process claims, must fail.

CONCLUSION

In apportioning the costs of modern life, Congress must often determine which expenses should properly be seen as liabilities belonging to society as a whole, and which should instead be treated as obligations of a smaller subset of the population. Congress could reasonably have determined that plaintiffs, along with other recipients of government-enriched uranium, were the beneficiaries of the process through which the uranium plants became contaminated. The fact that plaintiffs may not have caused the contamination, and indeed may simply have received a benefit from uranium plants long- contaminated before plaintiffs' arrival on the scene, does not diminish their accountability. The burden imposed on plaintiffs by the Energy Policy Act is not impermissibly substantial, nor unduly retroactive, nor unacceptably divorced from plaintiffs' experience with the program so as to violate any constitutional mandate. Plaintiffs have suffered no unconstitutional taking nor other unlawful exaction of their funds. We therefore grant defendant's motion to dismiss and direct the entry of judgment accordingly.

APPENDIX C

UNITED STATES COURT OF APPEALS
FEDERAL CIRCUIT

No. 00-5069

COMMONWEALTH EDISON COMPANY,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee.

Nov. 20, 2001

Before MAYER, *Chief Judge*, NEWMAN, MICHEL, LOURIE, CLEVENGER, RADER, SCHALL, BRYSON, GAJARSA, LINN, and DYK, *Circuit Judges.*[*]

DYK, *Circuit Judge.*

This case is one of a large number of cases brought in the Court of Federal Claims challenging the constitutionality of the Energy Policy Act of 1992, Pub.L. No. 102-486, 106 Stat. 2776 (codified as amended in various sections of 42 U.S.C.) ("EPACT" or "the Act"), which imposes special monetary assessments on domestic utilities for the remediation of environmentally contaminated uranium processing facilities owned by the United States. *See* 42 U.S.C. § 2297g 1. After argument before a panel on April 4, 2001, we *sua sponte* ordered that the case be heard in banc without additional briefing. The case was heard in banc on October 3, 2001.

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[*] Circuit Judge Prost, who entered on duty on October 3, 2001, has not participated in the disposition of this case.

In light of our decision in *Consolidated Edison Co. v. United States*, 247 F.3d 1378 (Fed.Cir.2001),[1] Edison's request for a stay of the proceedings in the Court of Federal Claims has become moot.

On the merits, we conclude that requiring plaintiff Commonwealth Edison Company ("Edison") and the other domestic utilities that benefited from the uranium processing services to contribute to the remediation costs does not constitute a Fifth Amendment taking because the Takings Clause does not apply to legislation requiring the payment of money. We also conclude that the Act does not violate the Due Process Clause of the Fifth Amendment. The retroactive application of the Act rationally furthers a legitimate legislative objective—the remediation of contaminated facilities used by the United States to process uranium for domestic utilities. Congress reasonably concluded that the utilities received benefits from the processing and that the utility processing contributed to the contamination. Liability was imposed on those utilities for only a portion of the cleanup costs. As a matter of law, Edison and other similarly situated utilities could have reasonably expected to be liable for a share of the remediation costs arising from the contamination of the processing facilities. Edison's other arguments on the merits are foreclosed by our decision in *Yankee Atomic Electric Co. v. United States*, 112 F.3d 1569 (Fed.Cir.1997), *cert. denied*, 524 U.S. 951, 118 S.Ct. 2365, 141 L.Ed.2d 735 (1998).

We therefore dismiss as moot the appeal from the denial of the stay request and affirm the decision of the Court of Federal Claims dismissing the complaint.

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[1] This opinion replaced our previous decision in that case, reported at 234 F.3d 642 (Fed.Cir.2000).

This case arises against the background of our earlier decision in *Yankee Atomic* where we rejected contentions that EPACT breached uranium processing contracts between Yankee Atomic Electric Co. ("Yankee Atomic") and the United States and constituted a taking of those contract rights. Some of the claims asserted by Edison are the same as those asserted in *Yankee Atomic*. Edison also claims that the statutory obligation to pay money to the government constitutes a taking of that money, and that the retroactivity of the Act renders it unconstitutional under the Due Process Clause.

Resolution of this appeal requires a brief overview of the history of the United States government's involvement in the enrichment of low-grade uranium for Edison and other domestic utilities, as well as the provisions of EPACT.

The uranium processing facilities involved here were originally constructed and operated by the United States government for national defense purposes. Between 1945 and 1970, approximately 96% of the enriched uranium produced by the government was used for weapons production. These facilities were also capable of producing enriched uranium for nuclear power reactors.

Before 1954, United States law permitted only the United States government to own nuclear power reactors. In 1954, however, Congress enacted amendments to the Atomic Energy Act of 1954, Pub.L. No. 83-703, 68 Stat. 919, which for the first time authorized private ownership of nuclear power reactors. The government extensively regulated these reactors, *inter alia*, "to protect the health and safety of the public" from the possible environmental hazards. *Id.* at § 2 (codified as amended at 42 U.S.C. § 2210).

Plaintiff Edison is a domestic utility company with its principal place of business in Illinois. Beginning in 1960, Edison owned and operated nuclear reactors, which it used to

customers in Illinois. Those nuclear reactors, in turn, required enriched uranium.

Edison alleges that in 1960 it began to "purchase or lease" enrichment services from the government. However, we note that until 1964 the government retained strict control over the technology used to enrich low-grade uranium for use in nuclear reactors, and barred private ownership of enriched uranium. In that year, Congress passed the Private Ownership of Special Nuclear Materials Act, Pub.L. No. 88-489, 78 Stat. 602 (1964), which authorized the private ownership of enriched uranium. After the passage of that act, the government began to offer uranium enrichment services to commercial customers like Edison.

Beginning in 1969, Edison entered into a series of multi-year contracts with the United States government in which Edison agreed to purchase uranium enrichment services from the United States. Those enrichment services were provided at enrichment plants operated first by the Atomic Energy Commission and later (beginning in 1974) by the Energy Research and Development Administration and, ultimately (beginning in 1977) by the Department of Energy (collectively, "DOE").

Under those contracts, Edison delivered low-grade uranium to the government-owned facilities for enrichment. The government took title to the low-grade uranium, processed the uranium, and returned enriched uranium to Edision. The enrichment services were measured in terms of "separative work units" ("SWUs"). The plaintiff here, like other domestic utilities, paid for the services by multiplying the number of SWUs provided by the unit price set forth in its contracts with the government. Although the utilities' contracts varied somewhat, each stated that the price paid by the utility for the enrichment services would be based on an "established Commission pricing policy," defined under the

[illegible] in effect at the time the service was rendered. A number of these contracts also capped the maximum per unit charge for the enrichment services. Edison alleges in its complaint that it purchased a portion of its uranium enrichment services "with the Government's knowledge and consent, from other sources." First Amended Complaint of Plaintiff-Appellant Commonwealth Edison Company (hereinafter "Complaint") at ¶ 50.

Edison alleges that "[b]y the late 1970s and early 1980s, foreign suppliers of uranium enrichment services emerged, threatening the Government's monopoly power and creating significant competition for the Government." *Id.* at ¶ 41. Edison further alleges that the Government's share of the uranium processing market "declined substantially, from nearly 100% in the 1960s and 1970s, to below 50% in 1983." *Id.* Edison elected, however, to continue to use government processing facilities even though those foreign alternatives became available.

In January 1984, the government developed a standard requirements-type contract for uranium enrichment services, referred to as a Utility Services Contract. In July 1984, Edison entered into a Utility Services Contract after terminating all of its existing uranium enrichment services contracts with the government through a Supplemental Agreement of Settlement ("Settlement Agreement"). This Utility Services Contract, like the previous contracts, charged the utilities for the services according to the "established pricing policy," and likewise capped the maximum unit charge. It appears that the government developed this Utility Services Contract, at least in part, at the request of Edison and the other domestic utilities.

As a result of the government's use of the processing facilities for national defense purposes, they had become contaminated, even before the utilities' uranium processing commenced. Although Edison alleges that the facilities were

"fully contaminated with radioactive and other hazardous materials" before they began to be used for the processing of the utilities' uranium, Complaint at ¶ 23, there is no question that the processing of the utilities' uranium caused the same type of contamination as the government's earlier use of the facilities to enrich uranium for weapons purposes. Indeed, Edison at oral argument specifically conceded that that was the case, and agreed that contamination cleanup costs are incurred any time uranium is enriched, including when it is enriched for the benefit of the utilities. Edison alleged, however, that the cleanup costs were not "materially" increased by the later contamination resulting from the utility uranium processing.[2]

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[2] At oral argument, counsel for Edison explained Edison's contribution to the contamination as follows:

> COUNSEL FOR EDISON: If it can be demonstrated—in our cases there's nothing in the record—but if it can be demonstrated that there was additional cost associated with the enrichment being—services provided to the commercial utilities, then perhaps there would be an argument that we have a certain responsibility. . . .
> THE COURT: Well, of course there are. You can't run a nuclear enrichment program without creating contamination, so of course we can quarrel about exactly how to measure them or how big they are, but of course there are contamination cleanup costs.
>
> COUNSEL FOR EDISON: There are. Let me try to make an analogy. . . . I know in terms of nuclear utilities, when they have boiling water, nuclear generated, and they periodically are required to decontaminate, what they do is they have these very large deep swimming pool type reactors. What they do is paint the well of the reactor with a rubberized paint that the contamination adheres to. Then they peel that paint off and the—. . . The contamination adheres to that paint. So regardless of whether there is a half inch of contamination or a full inch of contamination, all the contamination adheres to that rubberized paint and you just peel it off, and the cost is no more.
>
> THE COURT: Well, that's basically your point, that the processing of the utilities' uranium caused pollution, but it didn't cost any more

Edison also admits in its complaint that the obligation to decontaminate and decommission the facilities "was an obligation well understood by operators of nuclear facilities throughout the industry." Complaint at ¶ 31. Although the contracts provided for recovery of the government's costs of operating the plants and fixed the price as of the time of delivery, the original contracts, the Utility Services Contract, and the Settlement Agreement did not expressly preclude (or even address) the government's future assignment to Edison of any remediation costs for the decontamination of the government's uranium enrichment facilities.[3]

These remediation costs were addressed by Congress in 1992. Faced with its declining share of the uranium processing market, Congress decided to restructure the government's uranium processing services in order to remain competitive with its overseas providers. Congress created a new, for-profit, governmental corporation called the United States Enrichment Corporation ("USEC") to provide those services to Edison and other domestic utilities.

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to clean it up than it would have cost to clean up the weapons pollution, right?

COUNSEL FOR EDISON: Exactly. Yes, Sir.

[3] The Utility Services Contract merely stated, in pertinent part, that:

> [T]he Customer and DOE desire to terminate all previous long-term contracts between the Customer and DOE for the furnishing of uranium enrichment services *in order to accommodate the Customer's desire to obtain such services under the Utility Services form of uranium enrichment services contract* . . . .

(Emphasis added.). That contract further provided that "the unit charge for enrichment services under this contract shall not exceed a ceiling charge of $135.00 per separative work unit through September 30, 1985."

The Settlement Agreement provided that "the Government agrees that all obligations arising under the [previous] contracts or by reason of their termination shall be deemed to be concluded."

At the same time that it created the USEC, Congress in EPACT addressed the need to decontaminate and decommission the government's uranium enrichment facilities. The DOE "estimated that the total cost of this clean up could exceed $20 billion over 40 years, which amounted to about $500 million per year, indexed to inflation." *Yankee Atomic*, 112 F.3d at 1572. As this court noted in *Yankee Atomic*, "[b]ecause [the magnitude of] this decontamination and decommissioning fiscal problem was not [fully] recognized until the 1980s, the prices charged in the Government's past uranium enrichment contracts had not accounted for the problem." *Id.*

EPACT established a Uranium Enrichment Decontamination and Decommissioning Fund (the "Fund") to accumulate over a fifteen-year period the funds necessary to remediate the uranium enrichment facilities. 42 U.S.C. §§ 2297g, 2297g 1. The Act provided that the costs were to be shared by the government and those domestic utilities that benefited from processing at government facilities. The Act accordingly provided that the annual deposits of $480 million (adjusted for inflation) would come from two sources: (1) up to $150 million (or up to approximately 32% of the total amount) was to be collected as a special assessment from domestic utilities[4] that purchased (on the primary or secondary markets) the uranium enriched at these facilities; and (2) the balance of at least $330 million-the lion's share of the costs, amounting to at least 68%-was to be paid by the government. The Act further provided that the imposition of these special assessments on Edison and the other utilities would cease after the earlier of 15 years after October 24, 1992 (the date of EPACT's enactment) or the collection of

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[4] The implementing regulations for the Fund defined "domestic utility" as any utility in the United States that purchased SWUs from the government between 1945 and October 23, 1992. *See* 10 C.F.R. § 766.3. It is undisputed that Edison meets this definition.

$2.25 billion (again adjusted for inflation) from the domestic utilities. *See* 42 U.S.C. § 2297g-1.

Under the Act, the special assessment imposed on each domestic utility was based on the percentage of SWUs purchased from the DOE relative to the total number of SWUs produced by the DOE. 42 U.S.C. § 2297g-1(c). As noted above, the Act provided that a domestic utility was considered to have purchased a SWU from the DOE if the SWU was originally produced by the DOE, even if the utility actually purchased it from another source. Similarly, a utility was not considered to have purchased a SWU from the DOE if it subsequently resold that SWU to another utility. As this court noted in *Yankee Atomic*, "[i]n sum, the Act impose[d] the assessment upon whichever utility company eventually use [d] the enrichment services." 112 F.3d at 1572.

Two groups of purchasers of uranium enrichment services were exempt from the special assessment: (1) domestic utilities that purchased USEC services any time after 1992; and (2) foreign utilities, which represented 25% of DOE's pre-1992 customer base. *See Commonwealth Edison Co. v. United States*, 46 Fed. Cl. 29, 33 n. 1 (2000); *see also* Complaint at ¶ 25 (alleging that sales to foreign utilities historically "accounted for approximately 25% of the Government's commercial uranium enrichment market").

EPACT also provided the utilities with a "pass-through" provision, providing in pertinent part that the special assessment "shall be deemed a necessary and reasonable current cost of fuel and shall be fully recoverable in rates in all jurisdictions in the same manner as the utility's other fuel cost." 42 U.S.C. § 2297g-1(g). This statutorily mandated pass-through provision was binding on state regulatory agencies. *See Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354, 369-72, 108 S.Ct. 2428, 101 L.Ed.2d 322 (1988); *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 962-65, 106 S.Ct. 2349, 90 L.Ed.2d 943 (1986). At

oral argument, counsel for Edison conceded that Edison sought to recover the costs of the special assessment by passing the costs through to Edison's customers, though counsel expressed some doubt whether Edison recovered those costs in light of deregulation of the market and the competitive rates that deregulation produced.

The cost-sharing provisions were enacted after "much congressional debate over the issue of how these costs should be recovered, especially to what extent DOE's nuclear utility customers should be expected to share in paying for these costs." 138 Cong. Rec. H11,399, H11,401 (1992) (statement of Rep. Phillip Sharp on Conference Report), *reprinted in* Senate Comm. On Energy & Natural Res., 103d Congress 2d. Sess., *6 Legislative History of the Energy Policy Act of 1992*, at 4519, 4553 (Comm. Print 1994). Ultimately, the utilities' share was limited to 32% even though the House Report concluded that "[h]istorical production from these plants ha[d] been divided almost evenly between the government and commercial sectors." H.R.Rep. No. 102-474(I), at 144 (1992), *reprinted in* 1992 U.S.C.C.A.N. 1953, 1967.

Indeed, Edison and other utilities participated actively in shaping the legislation that became EPACT and approved the concept of cost sharing. *See Comprehensive National Energy Policy Act: Hearings on H.R. 776 Before the House Comm. on Ways & Means*, 102d Cong. 170-83 (1992) ("Committee Hearings I"). During the course of EPACT's consideration, the House Committee on Energy and Commerce proposed to impose "a $419 million annual liability, or a $9 billion [liability] over 20 years," on the utility industry for remediation of the enrichment facilities. *Id.* at 181. In Edison's case the company estimated that this funding proposal, if enacted, would increase its uranium enrichment costs by "one third" over the amount it had already agreed to pay. *Id.*

In the hearings on EPACT, Edison's President complained that the industry was being asked to pay a "disproportionate share" of the costs, and, as in the present Complaint, stated that "virtually all the contamination at [the government enrichment] facilities occurred during the first 20 years of operations, when operations were strictly for the defense program." *Id.* at 180-81 (statement of Bide L. Thomas, President, Commonwealth Edison Co., *et al.*).[5] Edison offered no independent study of the industry's relative contribution to the contamination and relied entirely on the testimony of the Department of Energy. That testimony, by Assistant Secretary for Nuclear Energy William Young, was that "there is additional pollution in the area of the sites [of the enrichment facilities] because of commercial operations subsequent to the exclusive operation [of the facilities] for the government." *Department of Energy Budget Request for Fiscal Year 1993: Oversight Hearing Before the Subcomm. On Energy and the Env't of the House Comm. on Interior and Insular Affairs,* 102d Cong. 80 (1992) ("Committee Hearings II"). He estimated the remediation costs for that portion of the pollution attributable to the enrichment of the utilities' uranium amounted to approximately $1.6 billion, out of a total cost of approximately $18.5 billion. He concluded that "[i]f you look at it from a polluter-pays basis, about $1.6 billion of that $18.5 billion would be properly allocated to commercial customers" of the enrichment facilities. *Id.* at 79.[6]

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[5] This testimony was a joint statement of Bide L. Thomas; Michael R. Peevey, President, Southern California Edison Co.; and Joseph M. Farley, Chairman and Chief Executive Officer, Southern Nuclear Operating Co. *See id.* at 178.

[6] Assistant Secretary Young further explained this proposed allocation when questioned by Representative Kostmayer during his testimony:

> MR. KOSTMAYER: Who else did the polluting besides the government?

Based on Edison's view of the industry's responsibility for the contamination, Edison reaffirmed its and other utilities' "willingness to pay a fair share of the [decontamination and decommissioning costs] for these [enrichment] facilities." Committee Hearings I at 182; *see also id.* at 172 ("[T]he industry is willing to participate in the cleanup program . . . .") (testimony of Bide L. Thomas, President, Common-

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> MR. YOUNG: In some cases, there is additional pollution in the area of the sites because of [the] commercial operations subsequent to the exclusive operation for the government. Some of the tailings are there as a result of commercial operations, for example.
>
> MR. KOSTMAYER: Commercial operations conducted by some party other than the government?
>
> MR. YOUNG: No, no. We have run the diffusion plants. A certain amount of the tails are there because of [the] SWUs produced for the government. Another certain amount of the tails are there because of SWUs produced for commercial customers.
>
> . . .
>
> MR. YOUNG: . . . The largest piece of [the estimated total cleanup cost] is $14 billion which is [decontamination and decommissioning] of the buildings and systems themselves. Of that, because of the government operation having led to the contamination, we are saying the government would pay 100 percent of that.
>
> There are two other elements of the cleanup that has got to take place. One is on the grounds around the facilities and we are saying that some of the contamination that occurred in the ground resulted not solely from the 20 years of government operation, but a measurable amount more resulted from the commercial-or operation to the benefit of commercial customers. And since we did not pass those costs on in the past, we feel it is equitable to pass those costs on in the future.
>
> Further, with the tails, some of the tails were created for the benefit of commercial customers, and the portion that was, and again, not passed on in the past, we feel it is equitable to pass it on to commercial customers at this time.

Committee Hearings II at 80-81.

wealth Edison Company). But Edison and other utilities objected that their share should not exceed the $1.6 billion estimated by the Department of Energy, and sought "a cap to protect ratepayers from being assessed more than their fair share of costs." *Id.* at 181. Edison and other utilities urged Congress to adopt a compromise funding proposal-one adopted by the House Committee on Science, Space and Technology (the "Science Committee")—that would have capped the utilities' liability for the remediation costs at $2.5 billion. Edison and two other utilities stated, on behalf of themselves and two industry interest groups,[7] that:

> While $2.5 billion is significantly more than the $1.6 billion that DOE estimates the civilian sector should contribute [to the remediation of the enrichment facilities], *the industry is willing to accept this compromise in the interest of providing certain liability levels and to move forward with this restructuring legislation and [decontamination and decommissioning] program.*

Id. at 182. (Emphasis added.). The liability cap proposed by the Science Committee, which Edison viewed as protecting its ratepayers from paying more than "their fair share of [remediation] costs," essentially became the cap in the legislation that Edison now challenges, though the ultimate liability of the utilities under the enacted legislation was more certain than under the Science Committee proposal. *See* 42 U.S.C. § 2297g-1.

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[7] These interest groups were the American Nuclear Energy Council ("ANEC") and the Edison Electric Institute ("EEI"). ANEC "represents over 100 domestic and international organizations that have an interest in nuclear energy." EEI, in turn, "is the national association of investor-owned electric companies" and represents "approximately three-quarters of all American electricity customers." Committee Hearings I at 178.

Following the enactment of EPACT in 1992, as well as corresponding DOE regulations implementing EPACT, the government assessed Edison and similarly situated domestic utilities on an annual basis for each utility's share of the special assessment. Edison alleges that as of the date of the complaint, it had paid the government approximately $95.5 million in seven special assessments for the decontamination and decommissioning of the enrichment facilities. These special assessments covered the period from 1969, when Edison first began to purchase uranium processing services from the government, until 1992, the year of EPACT's enactment.

PROCEEDINGS BELOW

On April 9, 1997, Edison commenced an action in the Court of Federal Claims challenging the legality of the special assessments authorized by the Act. Edison's original complaint alleged that the special assessment breached its contracts with the government by retroactively increasing the cost of the uranium enrichment services and constituted an impermissible taking of those contracts in violation of the Fifth Amendment. *See, e.g.*, Original Complaint of Plaintiff Appellant Commonwealth Edison Company at ¶¶ 53, 68-69. On May 6, 1997, during the pendency of Edison's action, this court issued its decision in *Yankee Atomic* rejecting identical claims made by another utility.

Following our decision in *Yankee Atomic*, Edison filed a new and separate action for declaratory and injunctive relief in the United States District Court for the Southern District of New York seeking to invalidate EPACT and to bar the government from attempting to compel future payments under the Act (the "New York action"). The district court subsequently denied a motion by the United States to transfer the case to the Court of Federal Claims. *Consol. Edison Co. v. United States*, 45 F.Supp.2d 331 (S.D.N.Y.1999). In

Consol. Edison Co. v. United States, Dept. of Energy, 247 F.3d 1378 (Fed.Cir.2001), we reversed that decision and instructed the district court to transfer the New York action to the Court of Federal Claims for adjudication.

On November 6, 1998, Edison also filed a motion in the Court of Federal Claims to stay proceedings in that court pending resolution of the New York action. On February 2, 1999, Edison amended its original complaint in the Court of Federal Claims to state new and additional theories for recovery. The amended complaint stated essentially three theories for recovery. Edison alleged that the special assessments imposed by EPACT: (1) constituted an unlawful taking of money under the Takings Clause of the Fifth Amendment; (2) constituted a breach of contract, inasmuch as "[t]he fixed price nature of [Edison's] enrichment contracts, coupled with the additional release granted by the Government pursuant to the termination of certain of those contracts, provided [Edison] with an unmistakable promise that it would not be subject to future liability to the Government based upon its contractual purchases of enrichment services"; and (3) constituted an illegal exaction in violation of the Due Process Clause of that amendment. The government moved to dismiss the amended complaint for failure to state a claim.

On February 3, 2000, the Court of Federal Claims denied Edison's motion for a stay, noting, in part, that the original action in the Court of Federal Claims was the first filed action and that it "has the jurisdiction to rule on each of the counts in the amended complaint and thus need not defer to the district court's broader jurisdiction." *Commonwealth Edison*, 46 Fed. Cl. at 34. In a well-reasoned opinion, the Court of Federal Claims also granted the government's motion to dismiss, concluding that neither the old nor new theories of recovery stated a claim. That court rejected Edison's first claim—that EPACT constituted an impermissible taking of

Edison's property without just compensation—on the ground that "a government-imposed payment of money cannot result in a compensable taking." *Id.* at 41.

The court dismissed the utility's claim that the imposition of the special assessments constituted a taking of its contract rights with the government, finding that "this issue was squarely addressed" in this court's decision in *Yankee Atomic*. *Id.* at 46. In reaching this conclusion, the court rejected Edison's arguments that its contracts with the government were significantly different from those contracts at issue in *Yankee Atomic*. *Id.*

Finally, the court rejected Edison's claim that the special assessment constituted an illegal exaction barred under the Due Process Clause. Recognizing the well-established principle that "an economic statute, such as the Energy Policy Act, comes to the court with a presumption of validity," *id.* at 43, the Court of Federal Claims determined that although the Act is indeed retroactive, "it cannot be said that the retroactivity of the Act is irrational or that that retroactivity unfairly impacted on the plaintiff." *Id.* at 44 (citing *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 18, 96 S.Ct. 2882, 49 L.Ed.2d 752 (1976)). The court further held that "the liability imposed by the special assessment is neither disproportional nor excessive," as EPACT imposed "liability only on those utilities that benefited from the government's uranium enrichment services." *Id.* at 45.

This timely appeal followed. We have jurisdiction over this appeal pursuant to 28 U.S.C. § 1295(a)(3).[8]

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[8] *Amicus Curiae* briefs in support of Edison were filed in this case by Sacramento Municipal Utility District and Maine Yankee Atomic Power Co.

DISCUSSION

I

As an initial matter, we note that the decision of the Court of Federal Claims to deny Edison's request for a stay of those proceedings pending resolution of the New York action is now moot, in light of our decision in *Consolidated Edison*, 247 F.3d 1378, in which we instructed the United States District Court for the Southern District of New York to transfer that action to the Court of Federal Claims.

Accordingly, the only question before us is whether the Court of Federal Claims erred in dismissing this action for failure to state a claim upon which relief may be granted. We review that decision without deference. *First Hartford Corp. Pension Plan & Trust v. United States*, 194 F.3d 1279, 1286-87 (Fed.Cir.1999). In so doing, we also "assume that all well-pled factual assertions are true and make all reasonable inferences in favor of" Commonwealth Edison, *New Valley Corp. v. United States*, 119 F.3d 1576, 1580 (Fed.Cir.1997), to the extent that such allegations are relevant to the constitutional issues.

II

Ever since the New Deal Supreme Court's discarding of the *Lochner* [9] line of substantive due process cases, the Court has repeatedly held that economic legislation "adjusting the burdens and benefits of economic life" is to be judged under a deferential standard. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15, 96 S.Ct. 2882, 49 L.Ed.2d 752 (1976). There remain, however, at least three areas in which judicial review of federal legislation imposing regulatory burdens still bites. Not surprisingly, Edison relies on each of these three theories.

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[9] *Lochner v. New York*, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905).

First, there are the takings cases, in which the government is alleged to have taken property without just compensation under the Fifth Amendment. The Supreme Court has made clear that government regulation can constitute a taking of property requiring compensation. *See, e.g., Lucas v. So. Carolina Coastal Council*, 505 U.S. 1003, 1027-28, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992). It is also clear that a fund of money can be property protected under the Takings Clause. *See Phillips v. Washington Legal Found.*, 524 U.S. 156, 160, 118 S.Ct. 1925, 141 L.Ed.2d 174 (1998) (holding that interest income generated by funds held in IOLTA accounts is private property of the owner of the principal for purposes of the Takings Clause); *see also Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164-65, 101 S.Ct. 446, 66 L.Ed.2d 358 (1980) (holding that the Takings Clause can apply to monetary interest generated from the operation of a specific, separately identifiable fund of money). However, although a minority of the Supreme Court has urged that a taking can occur when Congress has imposed an obligation to pay money, *see Eastern Enterprises v. Apfel*, 524 U.S. 498, 537, 118 S.Ct. 2131, 141 L.Ed.2d 451 (1998), we are bound to follow the views of a majority of the Supreme Court.

In *United States v. Sperry Corp.*, 493 U.S. 52, 110 S.Ct. 387, 107 L.Ed.2d 290 (1989), the Supreme Court held that a federal statute that required the payment of a portion of an arbitral award from the Iran-United States Claim Tribunal to the United States government did not violate the Takings Clause because, in part, "[i]t is artificial to view deductions of a percentage of a monetary award as physical appropriations of property. Unlike real or personal property, money is fungible." *Id.* at 62 n. 9, 110 S.Ct. 387.

In *Eastern Enterprises*, five justices of the Court rejected the theory that an obligation to pay money constitutes a taking. There, the Supreme Court confronted a constitutional challenge to the retroactive liability provisions of the Coal

Industry Retiree Health Benefit Act of 1992, codified at 26 U.S.C. §§ 9701-9722 (the "Coal Act"). The Coal Act required coal operators such as petitioner Eastern Enterprises ("Eastern") to fund future health benefits of current and former coal mine employees. There was no majority opinion of the Supreme Court. Writing for the plurality, Justice O'Connor, joined by three other justices, concluded that the retroactive impact of the Coal Act as applied to Eastern Enterprises resulted in an unconstitutional taking of property because it placed a "severe, disproportionate and extremely retroactive burden on Eastern." *Eastern Enters.*, 524 U.S. at 538, 118 S.Ct. 2131.

Justice Kennedy in his concurrence, however, disagreed with the plurality's conclusion that the Coal Act resulted in an unconstitutional taking of property:

> Our cases do not support the plurality's conclusion that the Coal Act takes property. The Coal Act imposes a staggering financial burden on the petitioner, Eastern Enterprises, but it regulates the former mine owner without regard to property. It does not operate upon or alter an identified property interest, and it is not applicable to or measured by a property interest. The Coal Act does not appropriate, transfer, or encumber an estate in land (*e.g.*, a lien on a particular piece of property), a valuable interest in an intangible (*e.g.*, intellectual property), or even a bank account or accrued interest. The law simply imposes an obligation to perform an act, the payment of benefits.

Id. at 540, 118 S.Ct. 2131. The four dissenters in *Eastern Enterprises* (Justices Stevens, Souter, Ginbsurg, and Breyer) agreed that the Takings Clause was not implicated because "[t]he 'private property' upon which the [Takings] Clause traditionally has focused is a specific interest in physical or intellectual property. . . . This case involves not an interest in

physical or intellectual property, but an ordinary liability to pay money. . . ." *Id.* at 554, 118 S.Ct. 2131 (Citations omitted.).

Thus five justices of the Supreme Court in *Eastern Enterprises* agreed that regulatory actions requiring the payment of money are not takings.[10] We agree with the prevailing view that we are obligated to follow the views of that majority.

This court has similarly concluded that the imposition of an obligation to pay money does not constitute an unconstitutional taking of property. In *Atlas Corp. v. United States*, 895 F.2d 745 (Fed.Cir.), *cert. denied*, 498 U.S. 811, 111 S.Ct. 46, 112 L.Ed.2d 22 (1990), for example, we considered the constitutionality of the Uranium Mill Tailings Radiation

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[10] *See Parella v. Ret. Bd. of the R.I. Employees' Retirement Sys.*, 173 F.3d 46, 58 (1st Cir.1999) (upholding state statute temporarily withholding excess retirement benefits against a Takings Clause challenge because "a majority of justices found that the Takings Clause did not apply under the facts of *Eastern Enterprises*, because they concluded that a Takings Clause issue can arise only after a plaintiff's property right has been independently established"); *Unity Real Estate Co. v. Hudson*, 178 F.3d 649, 659 (3d Cir.) ("[W]e are bound to follow the five-four vote against the takings claim in Eastern."), *cert. denied*, 528 U.S. 963, 120 S.Ct. 396, 145 L.Ed.2d 309 (1999); *Holland v. Big River Minerals Corp.*, 181 F.3d 597, 606 (4th Cir.1999) (following Supreme Court in holding Takings Clause inapplicable to the Coal Act because five Justices in *Eastern Enterprises* reasoned that "no identifiable property interest was infringed by the legislation"), *cert. denied*, 528 U.S. 1117, 120 S.Ct. 936, 145 L.Ed.2d 814 (2000); *but see U.S. Fidelity & Guar. Co. v. McKeithen*, 226 F.3d 412, 416 (5th Cir.2000) (citing *Eastern Enterprises* but analyzing a Takings Clause challenge to retroactive assessments under the Louisiana Workers' Compensation Fund under *ad hoc*, fact-specific factors), *cert. denied*, ___U.S.___, 121 S.Ct. 1360, 149 L.Ed.2d 289 (2001); *United States v. Hercules, Inc.*, 247 F.3d 706, 722 (8th Cir.2001) (stating that "inquiry into the constitutionality of CERCLA . . . would be 'essentially ad hoc and fact intensive'" (quoting *Eastern Enterprises*, 524 U.S. at 523, 118 S.Ct. 2131)).

Control Act ("UMTRCA"), Pub.L. No. 95-604, 92 Stat. 3021 (1978), which required that uranium producers spend large sums of money to clean up uranium tailings piles, a by-product of uranium manufacture. We held that the UMTRCA's imposition of the obligation to pay money to clean up the tailings piles did not constitute an unconstitutional taking of property under the Takings Clause:

> In this case, [the uranium producer] has not alleged a physical taking of any of its property. Its complaint alleges only that it will be required to spend sums of money for reclamation of tailings and mill decommissioning. Requiring money to be spent is not a taking of property.

Id. at 756 (citing *United States v. Sperry Corp.*, 493 U.S. 52, 62 n. 9, 110 S.Ct. 387, 107 L.Ed.2d 290 (1989)).

In short, while a taking may occur when a specific fund of money is involved, the mere imposition of an obligation to pay money, as here, does not give rise to a claim under the Takings Clause of the Fifth Amendment.

III

The second area, represented by the Supreme Court's decision in *United States v. Winstar Corp.*, 518 U.S. 839, 116 S.Ct. 2432, 135 L.Ed.2d 964 (1996), involves contracts in which the government has agreed to pay damages if it engages in certain types of regulation.

A similar contract claim was made with respect to the present contracts and rejected by this court in *Yankee Atomic*. In that case, this court was confronted with a claim that the special assessments imposed under EPACT breached the utility's fixed-price contracts with the government by, "in effect, retroactively increasing the price that it must pay for the previously supplied uranium enrichment services." 112 F.3d at 1573. Relying on the analysis prescribed by the

Supreme Court's decision in *Winstar*, we held that the imposition of the special assessments was a lawful exercise of Congress's taxing power under the sovereign acts doctrine, and was not designed to retroactively increase the price of the government's earlier contracts with Yankee Atomic. *Id.* at 1575. In other words, this court concluded that the special assessments constituted "a general exercise of Congress's taxing power for the purpose of addressing a societal problem rather than an act that retroactively increases the price charged to contracting parties for uranium enrichment services." *Id.* at 1577.

We further held that because the contracts between the plaintiff in that case and the government "did not include an unmistakable promise that precluded the Government from later imposing an assessment upon all domestic utilities that employed the DOE's uranium enrichment services," *id.* at 1580, the special assessments imposed by the Act did not constitute a breach of contract. We similarly disposed of the plaintiff's takings claim by concluding that "[b]ecause the contracts did not contain an unmistakable promise against a future assessment, [the utility] had no property right (via a vested contract right) which was subsequently taken by the assessment." *Id.* at 1580 n. 8. This court denied Yankee Atomic's motion to rehear the case in banc, 112 F.3d 1569 (Fed.Cir.1997), and the Supreme Court denied certiorari, 524 U.S. 951, 118 S.Ct. 2365, 141 L.Ed.2d 735 (1998).

We reject Edison's request that we distinguish our decision in *Yankee Atomic*. There is no meaningful difference between the contract theories asserted here and in *Yankee Atomic*, and we therefore agree with the Court of Federal Claims' conclusion that Edison's claims based on its contracts with the government are barred by that decision. This also disposes of Edison's argument that the Act constitutes a taking of Edison's supposed contract rights to be free of future government assessments.

IV

The third area of judicial review occurs where a regulation is retroactive and accordingly implicates the Due Process Clause. The Supreme Court has made clear that federal legislation is to be construed to avoid retroactivity.[11] No such issue is presented here since the statute is clear on its face, and no party urges that a narrowing construction is either possible or appropriate. Accordingly, we must address the Due Process issue.

The standard of review in this area is well-settled. As the Supreme Court stated in *Turner Elkhorn*, 428 U.S. at 15, 96 S.Ct. 2882, "[i]t is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." So too the Supreme Court observed in *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 104 S.Ct. 2709, 81 L.Ed.2d 601 (1984):

> Provided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches.

Id. at 729, 104 S.Ct. 2709 (citing *Turner Elkhorn*, 428 U.S. at 15-16, 96 S.Ct. 2882). Where the basis for the challenge is

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[11] *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 270, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994) ("Since the early days of this Court, we have declined to give retroactive effect to statutes burdening private rights unless Congress had made clear its intent."); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208, 109 S.Ct. 468, 102 L.Ed.2d 493 (1988) ("[C]ongressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result.").

retroactivity, the Supreme Court has held that Due Process is satisfied "simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose." *Id.* at 730, 96 S.Ct. 2882.

In judging the rationality of legislation under the Due Process Clause, an evidentiary trial of facts, such as the relative contributions of weapons processing and utility fuel processing to the total contamination at the government plants, is not required. Rather, as the Supreme Court has noted in another context:

> the question is whether the legislative conclusion [to enact the statute] was reasonable and supported by substantial evidence in the record before Congress. In making that determination, we are not to re-weigh the evidence *de novo,* or to replace Congress' factual predictions with our own. Rather, we are simply to determine if the standard [of review] is satisfied. If it is, summary judgment . . . is appropriate regardless of whether the evidence is in conflict.

Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 211, 117 S.Ct. 1174, 137 L.Ed.2d 369 (1997) (Citations omitted.). In short, legislative facts control the analysis. In these Due Process cases the federal courts are not assigned the task of making policy, determining a fair outcome, or determining the actual state of facts. We are charged simply with determining whether the congressional action was rational.

Under that rational purpose standard it will be a rare circumstance where federal legislation that is retroactive will be held unconstitutional under the Due Process Clause. In the modern era this has occurred on only a very few occasions, even if we count *Eastern Enterprises* as being such a case. *See Nichols v. Coolidge*, 274 U.S. 531, 47 S.Ct. 710, 71 L.Ed. 1184 (1927); *Blodgett v. Holden*, 275 U.S. 142, 48 S.Ct. 105, 72 L.Ed. 206 (1927) (*per curiam*); *R.R. Ret.*

Bd. v. Alton R.R. Co., 295 U.S. 330, 55 S.Ct. 758, 79 L.Ed. 1468 (1935); *Eastern Enters.*, 524 U.S. 498, 118 S.Ct. 2131, 141 L.Ed.2d 451.[12]

The cases that invalidated these statutes were most unusual.

Both *Blodgett v. Holden* and *Nichols v. Coolidge* involved the government's retroactive application of revenue statutes to transactions made well before the enactment of the respective statutes. The Supreme Court held in both cases that such retroactive application violated due process. *Blodgett*, 275 U.S. at 147, 48 S.Ct. 105; *Nichols*, 274 U.S. at 542-43, 47 S.Ct. 710.[13]

In *United States v. Carlton*, 512 U.S. 26, 114 S.Ct. 2018, 129 L.Ed.2d 22 (1994), the Court questioned the continuing relevance of those decisions to present day challenges to retroactive statutes, concluding that "[t]hose cases were decided during an era characterized by exacting review of economic legislation under an approach that has long since been discarded." *Id.* at 34, 114 S.Ct. 2018. In any event those decisions were limited to situations involving a "wholly new tax." *Id.* EPACT, unlike the statutes at issue in those two cases, is not a mere revenue-raising measure. Rather, it represents an assessment on particular existing domestic utilities, which Congress concluded benefited from the government's operation of the uranium enrichment facilities,

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[12] *Cf. United States v. Sec. Indus. Bank*, 459 U.S. 70, 78-82, 103 S.Ct. 407, 74 L.Ed.2d 235 (1982) (declining to retroactively construe a provision of the Bankruptcy Reform Act, Pub.L. No. 95-592, 92 Stat. 2549 (1978), without clear evidence of Congressional intent to apply that statute retroactively, and expressing "substantial doubt whether the retroactive" application would "comport with the Fifth Amendment").

[13] *Untermyer v. Anderson*, 276 U.S. 440, 48 S.Ct. 353, 72 L.Ed. 645 (1928), involved a challenge to the same statute at issue in Blodgett, and reached the same result.

and which Congress also concluded were themselves partially responsible for the problem the statute seeks to remedy.

In *Alton*, the Court invalidated a statute that required railroads to establish a pension fund covering both current employees and former employees who had worked for the railroad within the year before passage of the statute because of the retroactive effect of the statute. *Alton* bears little resemblance to this case, and it appears that *Alton*, in any event, has effectively been overruled. *See Pension Benefit*, 467 U.S. at 733, 104 S.Ct. 2709 (questioning whether *Alton* "'retains vitality' despite the changes in judicial review of economic legislation that have occurred in the ensuing years"); *see also Turner Elkhorn*, 428 U.S. at 19, 96 S.Ct. 2882. We note that neither Edison nor any of its *amici* relies on *Alton*.

Eastern Enterprises, which is the focus of the parties' attention, is also starkly different from this case. There, the employees' claims of entitlement to the payment of future health benefits arose from a number of National Bituminous Coal Wage Agreements ("NBCWAs" or "Agreements") between the employees' union and various coal mine operators. The statute in *Eastern Enterprises* was justified on the ground that expectations of future benefits had been created by these agreements. A majority of the Court concluded that the obligation to pay benefits could not be imposed on companies that had no role in creating those expectations.

The plurality noted that Agreements negotiated in 1974, 1978, and subsequently first suggested an industry commitment to the funding of health benefits for former employees and their dependents. *Eastern Enters.*, 524 U.S. at 530, 118 S.Ct. 2131. The plurality emphasized, however, that Eastern "ceased its coal mining operations in 1965 and neither participated in negotiations nor agreed to make contributions in connection with the [employees'] Benefit Plans under the

1974, 1978 or subsequent NBCWA's." *Id.* Under the particular facts of that case, the plurality accordingly reasoned that the Coal Act's retroactive provisions violated the Takings Clause of the Fifth Amendment. In his concurrence, Justice Kennedy agreed with the plurality that the particular facts of the case warranted the invalidation of the statute, but based his reasoning on Due Process grounds. He wrote:

> Eastern was once in the coal business and employed many of the beneficiaries, but it was not responsible for their expectation of lifetime health benefits. . . . As the plurality opinion discusses in detail, the expectation was created by promises and agreements made long after Eastern left the coal business. Eastern was not responsible for the resulting chaos in the funding mechanism caused by other coal companies leaving the framework of the [NBCWA]. This case is far outside the bounds of retroactivity permissible under our law.

524 U.S. at 550, 118 S.Ct. 2131 (Kennedy, J., concurring).

Even if the *Eastern Enterprises* plurality and concurrence could be read together to announce a binding holding on the Due Process issue,[14] this case does not involve the imposition of liability on companies having no responsibility for creating the expectation of a future benefit. Rather, it involves a congressional determination to impose liability on companies that received a benefit, the production of which benefit contributed to a societal problem.

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[14] The District of Columbia Circuit has concluded that the plurality and concurrence in *Eastern Enterprises* cannot be combined into a single holding on the Due Process issue. *Ass'n of Bituminous Contractors v. Apfel*, 156 F.3d 1246, 1254-55 (D.C.Cir.1998) ("Justice Kennedy's concurrence in the judgment is of no help in appellant's efforts to cobble together a due process holding from *Eastern Enterprises*' fragmented parts. . . . Justice Kennedy's due process reasoning can in no sense be thought a logical subset of the plurality's takings analysis.").

On the other side of the balance, on more than ten occasions, the Supreme Court has rejected challenges to economic legislation based on the Due Process Clause of the Fifth Amendment. *See United States v. Carlton*, 512 U.S. 26, 35, 114 S.Ct. 2018, 129 L.Ed.2d 22 (1994) (upholding a retroactive amendment to the federal estate tax, even though the taxpayer received no advance notice of the amendment and relied to his detriment on pre-amendment law); *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 636-41, 113 S.Ct. 2264, 124 L.Ed.2d 539 (1993) (upholding retroactive withdrawal liability provisions of the Multiemployer Pension Plan Amendments Act ("MPPAA") which assessed employer nearly $300,000 for its withdrawal from a pension plan prior to the effective date of the MPPAA); *Gen. Motors Corp. v. Romein*, 503 U.S. 181, 191-92, 112 S.Ct. 1105, 117 L.Ed.2d 328 (1992) (finding that Michigan workers' compensation statute did not violate the Due Process Clause, even though it required the petitioners to pay nearly $25 million for retroactive benefits to disabled employees); *United States v. Sperry Corp.*, 493 U.S. 52, 64-65, 110 S.Ct. 387, 107 L.Ed.2d 290 (1989) (upholding retroactive imposition of an arbitration fee on prevailing parties before the Iran United States Claim Tribunal); *United States v. Hemme*, 476 U.S. 558, 571, 106 S.Ct. 2071, 90 L.Ed.2d 538 (1986) (rejecting Due Process challenge to statutorily-prescribed transitional rule that retroactively applied to gifts made before enactment of rule); *United States v. Locke*, 471 U.S. 84, 105-06, 105 S.Ct. 1785, 85 L.Ed.2d 64 (1985) (upholding the retroactive application of the filing requirements of the Federal Land Policy and Management Act of 1976 ("FLPMA"), codified at 43 U.S.C. § 1744, that resulted in the forfeiture of mining claims made before the enactment of the FLPMA); *Nat'l R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 475-79, 105 S.Ct. 1441, 84 L.Ed.2d 432 (1985) (upholding legislation requiring private railroads to reimburse Amtrak for

rail travel privileges provided by Amtrak to the private railroads' employees and former employees even though Amtrak for some years had not imposed such costs on the private railroads); *Pension Benefit*, 467 U.S. at 731-32, 104 S.Ct. 2709 (upholding the retroactive application of the withdrawal liability provisions of the MPPAA during period before the MPPAA's enactment); *United States v. Darusmont*, 449 U.S. 292, 296-302, 101 S.Ct. 549, 66 L.Ed.2d 513 (1981) (upholding the retroactive application of an amendment to the federal tax statute to transactions made before enactment of amendment); *Turner Elkhorn*, 428 U.S. at 18, 96 S.Ct. 2882 (upholding requirement that coal mine operators compensate former employees disabled by work-related illnesses, even though those operators had never contracted for such liability, and the employees involved were no longer employed by the operators); *FHA v. The Darlington, Inc.*, 358 U.S. 84, 91, 79 S.Ct. 141, 3 L.Ed.2d 132 (1958) (upholding application of statutory requirement that occupants of mortgaged housing must be residents as opposed to transients to apartment buildings mortgaged prior to enactment of the statute); *Lichter v. United States*, 334 U.S. 742, 788, 68 S.Ct. 1294, 92 L.Ed. 1694 (1948) (upholding statute permitting government to require private parties to pay excessive profits realized during wartime to the government); *Welch v. Henry*, 305 U.S. 134, 146-51, 59 S.Ct. 121, 83 L.Ed. 87 (1938) (sustaining retroactive Wisconsin statute that taxed shareholder dividends paid two years before statute's enactment); *Funkhouser v. J.B. Preston Co.*, 290 U.S. 163, 167-68, 54 S.Ct. 134, 78 L.Ed. 243 (1933) (upholding retroactive application of statute providing that interest be added to damages awards for breach of contract claims); *Milliken v. United States*, 283 U.S. 15, 21-24, 51 S.Ct. 324, 75 L.Ed. 809 (1931) (upholding retroactive application of federal estate tax statute to tax gifts made prior to enactment of the statute). In *Eastern Enterprises*, both the plurality and Justice Kennedy suggested that liability for

health care costs limited to miners formerly employed by the companies could be retroactively imposed, presumably because the companies benefited from their services, and the performance of those services contributed to the health problems.[15] Significantly, other courts of appeals have rejected claims that similar retroactive effects of the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601, *et seq.*, ("CERCLA") violate Due Process. *See United States v. Northeastern Pharm. & Chem. Co.*, 810 F.2d 726, 734 (8th Cir.1986), *cert. denied*, 484 U.S. 848, 108 S.Ct. 146, 98 L.Ed.2d 102 (1987); *United States v. Monsanto Co.*, 858 F.2d 160, 174 (4th Cir.1988), *cert. denied*, 490 U.S. 1106, 109 S.Ct. 3156, 104 L.Ed.2d 1019 (1989); *Franklin County Convention Facilities Auth. v. Am. Premier Underwriters, Inc.*, 240 F.3d 534, 551-52 (6th Cir. 2001).[16] And we also have repeatedly rejected Due

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[15] *See Eastern Enters.*, 524 U.S. at 536, 118 S.Ct. 2131 ("Eastern might be responsible for employment-related health problems of all former employees whether or not the cost was foreseen at the time of employment . . . .") (plurality opinion); *id.* at 549, 118 S.Ct. 2131 (noting that the Supreme Court has "upheld the imposition of liability on former employers based on past employment relationships") (Kennedy, J., concurring); *see also Turner Elkhorn*, 428 U.S. at 18, 96 S.Ct. 2882 ("[T]he imposition of liability for the effects of disabilities bred in the past is justified as a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor. . . .").

[16] These courts have reasoned that "[c]leaning up inactive and hazardous waste disposal sites is a legitimate legislative purpose, and Congress acted in a rational manner in imposing liability for the cost of cleaning up such sites upon those parties who created and profited from the sites and upon the chemical industry as a whole." *Northeastern Pharm.*, 810 F.2d at 734. *See also, e.g., O'Neil v. Picillo*, 883 F.2d 176, 183 n. 12 (1st Cir.1989), *cert. denied sub nom. American Cyanamid Co. v. O'Neil*, 493 U.S. 1071, 110 S.Ct. 1115, 107 L.Ed.2d 1022 (1990); *United States v. R.W. Meyer, Inc.*, 889 F.2d 1497, 1506 (6th Cir.1989), *cert. denied*, 494 U.S. 1057, 110 S.Ct. 1527, 108 L.Ed.2d 767 (1990); *Long Beach Unified Sch. Dist. v. Godwin Cal. Living Trust*, 32 F.3d 1364, 1366 (9th Cir.1994).

Process challenges to retroactive federal statutes. *See, e.g., Atlas*, 895 F.2d at 756 (upholding retroactive legislation requiring uranium producers to spend large sums of money to clean up uranium tailings piles).

Not surprisingly, in light of this history, the Supreme Court has repeatedly advised us that such Due Process challenges will only succeed in the rarest of cases. As Justice Kennedy noted in *Eastern Enterprises*, "[s]tatutes may be invalidated on due process grounds only under the most egregious of circumstances." 524 U.S. at 550, 118 S.Ct. 2131.

Although such "most egregious circumstances" do not exist *unless* the legislation is severely retroactive, they do not exist *merely because* the legislation is severely retroactive and costly, as is the case here. Without attempting to define exactly when retroactive legislation will be held unconstitutional, we perceive that the imposition of even severe retroactive obligations for past acts will be found rational and will be held constitutional under the Due Process Clause if two conditions are satisfied: (1) Congress reasonably concluded that the party subjected to retroactive obligations benefited from activity that contributed to a societal problem, and liability is not disproportionately imposed on that party; and (2) the imposition of retroactive liability would not be contrary to that party's reasonable expectations. It may well be that legislation is constitutional if either of the two conditions is satisfied, but we need not decide that question in this case. Both of those conditions are present.

The first is easily disposed of. Whether or not Edison received the enrichment services below cost from the government, as the government asserts, it certainly benefited from the government's provision of enrichment services. Edison admits that it received a benefit from the government's enrichment services (though it claims to have fully

compensated the government for the benefit).[17] Indeed, Edison could hardly have operated nuclear reactors without the benefit of uranium enrichment services from the United States government or some other approved source.

Congress could reasonably conclude that the processing of the utilities' uranium contributed to a societal problem (processing plant pollution) on two separate theories. First, while the weapons processing may have fully contaminated the buildings at the plants, the utility processing contributed to increased costs associated with decontaminating the grounds around the facilities and disposing of the tails. Second, whether or not the utility processing marginally increased the remediation costs, Congress could reasonably conclude that the later pollution should bear a share of the costs. Edison and utility industry groups themselves contributed to Congress' conclusion that the utilities were responsible by explicitly recognizing in the course of the legislative consideration that it would be fair to impose a share of the remediation costs on the utilities. *See ante* at 1334-36. The Court of Federal Claims does not sit to retry as a factual matter the reasonableness of such congressional judgments.[18]

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[17] *See* Brief for Plaintiff Appellant Commonwealth Edison Co. at 62 ("Although Commonwealth Edison obviously received a 'benefit' when it obtained enrichment services from the government, it paid a price agreed between the parties to represent the fair value of that benefit.").

[18] Even if the legislative history here were devoid of support for Congress' conclusions, it would not, of course, be "significant for due process purposes that the legislative history" did not address the issue of causation. *Ass'n of Bituminous Contractors, Inc. v. Apfel*, 156 F.3d 1246, 1256 n. 7 (D.C.Cir.1998). "[T]he government can create a rational explanation *ex post* to support a statute attacked on due process grounds. That being so, we can hardly require a showing that Congress specifically identified [the] cause of the problem before it passed the [Act] in order to sustain the Act under rational basis review." *Id. See also FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315, 113 S.Ct. 2096, 124 L.Ed.2d

The remediation costs imposed on Edison and the other domestic utilities also are not severely disproportionate; these utilities are obligated to pay only about a third of the remediation costs, even though evidence was presented that the "production from these plants ha[d] been divided almost evenly between the government and commercial sectors." H.R.Rep. No. 102-474(I), at 144 (1992), *reprinted in* 1992 U.S.C.C.A.N. 1953, 1967.[19] In *Pension Benefit*, 475 U.S. at 225-26, 106 S.Ct. 1018, for example, the Supreme Court held that the Multiemployer Pension Plan Amendments Act of 1980, 94 Stat. 1208 ("MPPAA") did not constitute an unconstitutional taking of property under the Takings Clause of the Fifth Amendment because "[t]here is nothing to show that the [retroactive] withdrawal liability actually imposed on an employer will always be out of proportion to its experience with the plan, and the mere fact that the employer must pay money to comply with the [MPPAA] is but a necessary consequence of the MPPAA's regulatory scheme." *Id.* The mere fact that foreign utilities are exempted from the assessment also does not mean that the liability imposed on the domestic utilities is severely disproportionate. *See Ass'n of Bituminous Contractors, Inc. v. Apfel*, 156 F.3d 1246, 1255-56 (D.C.Cir.1998); *Holland v. Keenan Trucking Co.*, 102 F.3d 736, 741-42 (4th Cir.1996).

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211 (1993) ("[B]ecause we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason . . . actually motivated the legislature. Thus, the absence of 'legislative facts' . . . has no significance in rational-basis analysis. In other words, a legislative choice is not subject to courtroom factfinding. . . .") (Citations omitted.).

[19] Amici Sacramento Municipal Utility District and Maine Yankee Atomic Power Company urge that a small portion of the Fund (approximately $75 million) has been used for thorium cleanup for which the utilities were not responsible. Considering that $7.2 billion was authorized for the Fund, *see* 42 U.S.C. § 2297g-1(a), (d), this *de minimus* diversion of funds does not affect our analysis.

This conclusion standing alone may be sufficient to warrant rejection of Edison's Due Process argument. The Supreme Court has held that it is rational for Congress to impose costs for certain activities on "those who have profited from the fruits of" activities that contributed to a societal problem, *Turner Elkhorn*, 428 U.S. at 18, 96 S.Ct. 2882, and that "our cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations," *id.* at 16, 96 S.Ct. 2882. However, Edison also has failed to establish that the retroactivity violated the utilities' reasonable expectations. That issue requires more extensive discussion.

V

One of the key questions in the Supreme Court's retroactivity decisions is whether the regulated party could have reasonably expected that it would be free from the regulatory exaction. Those decisions suggest that if the regulated party could have reasonably expected that it would be subject to regulation, there can be no constitutional Due Process violation. *See, e.g., Concrete Pipe & Prods. of Cal.*, 508 U.S. at 646, 113 S.Ct. 2264.[20] This critical theme was reiterated by each of the separate opinions in *Eastern Enterprises*. There the question was directed to reasonable expectations at the time that Eastern operated coal mines. The plurality concluded that the Coal Act constituted an impermissible taking because, in part, it "substantially interferes with Eastern's reasonable investment-backed expectations." *Eastern Enters.*, 524 U.S. at 532, 118 S.Ct. 2131. In reaching this conclusion, the plurality emphasized,

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[20] *Cf. Rogers v. Tennessee*, 532 U.S. 451, 121 S.Ct. 1693, 1700-01, 149 L.Ed.2d 697 (2001) (retroactive judicial abolition of archaic common law rule, which precluded murder conviction where victim did not die within year and a day of stabbing, was not unexpected under prior law, and thus did not violate Due Process).

in part, that Eastern had left the coal mining industry and had ceased to employ miners years before "lifetime medical benefits . . . [could] have been viewed as promised" by the industry. *Id.* at 535, 118 S.Ct. 2131.

Justice Kennedy, on Due Process grounds, agreed with the plurality that the three-factor regulatory takings analysis set forth in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978), including investment-backed expectations, was relevant to the analysis of the Coal Act's retroactivity. *Eastern Enters*, 524 U.S. at 547, 118 S.Ct. 2131 (Kennedy, J., concurring). He sustained Eastern's challenge to the Coal Act, in part, because the miners' expectations of future health benefits were "created by promises and agreements made long after Eastern left the coal business." *Id.* at 550, 118 S.Ct. 2131.

The dissenters likewise focused on Eastern's reasonable expectations to conclude that "the historical circumstances, taken together, prevent Eastern from showing that the Coal Act's 'reachback' liability provision so frustrates Eastern's reasonable settled expectations as to impose an unconstitutional liability." *Id.* at 559, 118 S.Ct. 2131. Thus, in *Eastern Enterprises* there was remarkable agreement on the reasonable expectations standard, if not its application to the particular case.

In addressing the issue of reasonable expectations here, we must separate the government as sovereign from the government as contracting party. The question, in other words, is not what Edison could expect the United States as contracting party to do but what it could reasonably expect the United States as sovereign to do. *See United States v. Winstar Corp.*, 518 U.S. 839, 116 S.Ct. 2432, 135 L.Ed.2d 964 (1996). Nor does the question require an evidentiary trial. Edison's subjective expectations are irrelevant. The question is what a reasonable company in Edison's position should have anticipated.

VI

The cases suggest three factors relevant to a determination of a party's reasonable expectations. First, was the company operating in a highly regulated industry? Second, did the company know of the problem at the time it engaged in the activity? Third, in the light of the regulatory environment at the time of the activities, could the possibility of the assessments have been reasonably anticipated? We conclude that each of these three factors is present here, and therefore we do not need to decide whether the presence of only one of these factors, without more, suffices to establish a lack of reasonable expectations.

Operation in a Highly Regulated Industry

First, it is undisputed that Edison operates in a highly regulated industry. As has been noted, "the production of energy from nuclear sources is one of the most highly regulated human activities." Peter Riley, *Legal Control of Nuclear Energy Between States*, 21 Cal. W. Int'l L.J. 303, 303 (1991).

We have previously held that participants in this highly regulated field can expect liability for remediation costs. Thus, in *Atlas*, 895 F.2d at 745, we considered the constitutionality of the UMTRCA, codified at 42 U.S.C. §§ 2022, 2113, 2114, 7901-7942, which required that uranium producers spend large sums of money to clean up uranium tailings piles. We held that the Court of Federal Claims had properly dismissed the complaint for failure to state a claim:

> From the outset of the uranium procurement program, the nuclear industry has been highly regulated, as the plaintiffs admit. "Those who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end." *Connolly*, 475 U.S. at 227, 106 S.Ct. 1018,

> quoting *FHA v. The Darlington, Inc.*, 358 U.S. 84, 91, 79 S.Ct. 141, 146, 3 L.Ed.2d 132 (1958). The only "expectation" that [the processors] could have under the circumstances it has alleged is that it expected it would not have to spend its own money to remediate health and environmental hazards created by its production of uranium. Such an expectation cannot be a reasonable commercial expectation.

Id. at 758. This holding was directly supported by the Supreme Court's decision in *Connolly*, in which the Court concluded that the imposition of withdrawal liability from a multiemployer pension plan on certain employers did not interfere with the company's reasonable expectations because, in part, the companies were well aware that "[p]ension plans . . . were the objects of legislative concern," and "it was clear" to those companies operating in that highly regulated industry that withdrawal liability could be retroactively imposed. 475 U.S. at 226-27, 106 S.Ct. 1018. We are aware of no case to the contrary.

Edison's Knowledge of the Hazards of the Uranium Processing

Second, it is undisputed that all parties here were aware of the hazardous nature of the materials. In its amended complaint, Edison admitted that the need to decontaminate and decommission the facilities "was an obligation well understood by operators of nuclear facilities throughout the industry." Complaint at ¶ 31. Likewise, counsel for Edison conceded at oral argument here that "[i]t was recognized from way back in the 1950s that there would be decontamination and decommissioning costs" arising from the operation of the uranium processing facilities.

A number of Supreme Court decisions make clear that company knowledge of the dangers present in their operations is relevant to a determination of reasonable expectations. In

Turner Elkhorn, for example, the Supreme Court noted that the coal mine operators had "been aware of the danger of pneumoconiosis for at least 20 years. . . ." 428 U.S. at 17, 96 S.Ct. 2882. So too in *Gen. Motors Corp. v. Romein*, 503 U.S. 181, 112 S.Ct. 1105, 117 L.Ed.2d 328 (1992), the Supreme Court ruled that a retroactive 1987 Michigan workers' compensation statute had not "unreasonably interfered with closed transactions" because the employers "knew they were taking a risk in reducing benefits to their workers, but they took their chances with their interpretation of the 1981 law." *Id.* at 191-92, 112 S.Ct. 1105.[21]

The Regulatory Environment

Finally, the regulatory environment is pertinent. We first consider the regulatory environment at the time when Edison received uranium enrichment services from the government. This focus on the regulatory climate at the time of the processing is supported not only by the Due Process cases discussed above but also by the regulatory takings cases.

The *Eastern Enterprises* plurality judged reasonable expectations for purposes of the takings analysis at the time of the relevant activity. *Eastern Enters.*, 524 U.S. at 532, 118 S.Ct. 2131. So too in *Pension Benefit*, 475 U.S. 211, 106 S.Ct. 1018, 89 L.Ed.2d 166, for example, the Supreme Court rejected the employer's takings claim that money had been taken unconstitutionally because, in part, it found that:

> Pension plans, however, were the objects of legislative concern long before the passage of ERISA in 1974 . . . . Prudent employers then had more than sufficient notice not only that pension plans were currently regulated, but

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[21] Other courts of appeals have also rejected challenges to CERCLA's retroactivity because, in part, "it was certainly foreseeable at the time that improper disposal could cause enormous damage to the environment." *Monsanto Co.*, 858 F.2d at 174.

> also that withdrawal itself might trigger additional financial obligations.

Id. at 226-27, 106 S.Ct. 1018.[22]

Where a Due Process violation is alleged because the government has ordered the payment of money, we think that reasonable expectations are to be judged as of the point at which the complaining party entered into the activity that triggered the obligation—here the submission of uranium for processing. We have no doubt that the utilities were on notice of the possible imposition of remediation liability at the times when the material was submitted for processing.

We first address the period following the enactment in 1980 of CERCLA, when the utilities should have been aware that statutory liability might be extended to cover other hazardous substances.[23]

CERCLA is a broad, remedial statute enacted by Congress in order to ensure "that those responsible for any damage, environmental harm, or injury from chemical poisons bear the costs of their actions." *Gen. Elec. Co. v. AAMCO Transmissions, Inc.*, 962 F.2d 281, 285 (2d Cir.1992)

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[22] Where a regulatory taking of real property is alleged, the state cannot defeat liability simply by showing that the current owner was aware of the regulatory restrictions at the time that the property was purchased. *See Palazzolo v. Rhode Island*, 533 U.S. 606,___, 121 S.Ct. 2448, 2462, 150 L.Ed.2d 592 (2001). As Justice O'Connor's concurring opinion in *Palazzolo* makes clear, however, even in that context the regulatory environment at the time of the acquisition of the property remains both relevant and important in judging reasonable expectations. *Id.* at 2465-66.

[23] CERCLA liability only attached to cleanup costs arising from the remediation of substances defined to be "hazardous substances" under CERCLA and the Environmental Protection Agency's implementing regulations. 42 U.S.C. § 9601(14); 40 C.F.R. § 302.4 (listing, *inter alia*, arsenic, lead, mercury and methane as hazardous substances). There is no dispute here that the uranium was a "hazardous substance" under CERCLA.

(quoting S.Rep. No. 96-848, at 13 (1980)). Under CERCLA, the Environmental Protection Agency ("EPA") is authorized to undertake remedial efforts to clean up hazardous waste spills, and, where an "imminent and substantial endangerment to the public health exists," to take legal action in order to compel potentially responsible parties to undertake their own private cleanup efforts. *Gen. Elec. Co.*, 962 F.2d at 285; 42 U.S.C. § 9606(a).

There are several aspects of CERCLA of immediate relevance here:

> "CERCLA is a strict liability statute, one of the purposes of which is to shift the cost of cleaning up environmental harm from the taxpayers to the parties who benefited from the disposal of the wastes that caused the harm." *In re Bell Petroleum Servs.*, 3 F.3d 889, 897 (5th Cir.1993); *see also United States v. Aceto Agric. Chems. Corp.*, 872 F.2d 1373, 1378 (8th Cir.1989).

CERCLA by its terms has unlimited retroactivity. Indeed, every court of appeals to consider the question has concluded that Congress intended CERCLA to apply retroactively. *See, e.g., Northeastern Pharm.*, 810 F.2d at 732; *Monsanto*, 858 F.2d at 174.

While the statute does cap those costs that may be imposed on current and former owners and other potentially responsible parties, those caps are quite high. *See* 42 U.S.C. § 9607(c). For example, the liability for the release of a hazardous substance from a facility is "the total of all costs of response plus $50,000,000 for any damages . . . ." § 9607(c)(1)(D).

Costs may be imposed on any current or former property owner or other potentially responsible party. *See Monsanto*, 858 F.2d at 167. Under CERCLA's liability provision, responsible parties include those who arrange for the

treatment of hazardous substances. A party may be liable under CERCLA for the arrangement for treatment of any "hazardous substances owned or possessed by [that party] . . . at any facility owned or operated by another party or entity and containing such hazardous substances. . . ." *Id.*[24]

This type of "arranger liability" may be imposed even if the party who arranges for the treatment of the hazardous substance does not actually perform the treatment. In *Aceto*, 872 F.2d 1373, for example, the Eighth Circuit held, *inter alia*, that the defendants which hired another company to formulate their technical grade pesticides into commercial grade pesticides, would be liable as an arranger under CERCLA if it were established that the defendants owned the technical grade pesticides and the final product and, in addition, knew that the generation of hazardous wastes was inherent in the formulation process. *Id.* at 1381-82.[25]

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[24] Section 9607(a)(3) imposes liability for "all costs of removal or remedial action incurred by the United States Government or a State" on:

> [A]ny person who, *by contract*, agreement, or otherwise *arranged* for disposal or *treatment*, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, *by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances* . . . .

42 U.S.C. § 9607(a)(3) (Emphases added.).

[25] Numerous other courts of appeals have approved the holding in *Aceto*. *See, e.g., Jones-Hamilton Co. v. Beazer Materials & Servs., Inc.*, 973 F.2d 688, 695 (9th Cir.1992).

Edison and the supporting *amici* unsuccessfully attempt to limit the reach of *Aceto*, based on decisions from other courts of appeals suggesting that that case would not extend to other situations, for example, situations in which the utilities merely arranged for the transportation of hazardous substances, *see United States v. Cello-Foil Products, Inc.*, 100 F.3d 1227, 1232 (6th Cir.1996), and *Amcast Industrial Corp. v. Detrex Corp.*, 2 F.3d 746, 751 (7th Cir.1993), *cert. denied*, 510 U.S. 1044, 114 S.Ct. 691, 126 L.Ed.2d 658 (1994), or the material submitted for processing was not

In other words, by 1980, Edison could have reasonably expected that the enrichment of its uranium by an independent contractor (the United States) could result in the passage of legislation retroactively imposing liability for a portion of the remediation costs on Edison and the other utilities that benefited from the processing facilities.

Even before the enactment of CERCLA in 1980 liability-imposing regulations were either already in place, or could have been anticipated. CERCLA was not an unheralded statute. Federal statutes enacted in the 1960s and 1970s imposed obligations on the federal government to develop and maintain certain minimum standards for clean air, *see* "Clean Air Act" of 1963, Pub.L. No. 88-206, 77 Stat. 392, codified at 42 U.S.C. §§ 7401-7642, and clean water, *see* Federal Water Pollution Control Act Amendments of 1972, Pub.L. No. 92-500, 86 Stat. 816, codified as amended at 33 U.S.C. §§ 1251-1376 (the "Clean Water Act" of 1972). In 1970, Congress enacted the National Environmental Policy Act, Pub.L. No. 91-190, 83 Stat. 852 (1970), codified at 42 U.S.C. §§ 4321-4370a, which required all federal agencies, *inter alia*, to conduct thorough assessments of the environmental impacts of all major programs.

By 1969, a number of federal statutes had been enacted or interpreted to impose liability for environmental damages. Section 13 of the Rivers and Harbors Appropriation Act of 1899, 30 Stat. 1152 (codified as amended at 33 U.S.C. § 407), for example, prohibited the discharge of refuse into navigable waters without a permit. In the 1960s, the Supreme Court interpreted that prohibition broadly to impose strict liability on companies for obstruction of waterways caused by the discharge of industrial waste. *See, e.g., United States v. Republic Steel Corp.*, 362 U.S. 482, 491, 80 S.Ct. 884,

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itself hazardous, *see Concrete Sales & Services, Inc., v. Blue Bird Body Co.*, 211 F.3d 1333, 1339 (11th Cir.2000).

4 L.Ed.2d 903 (1960); *United States v. Standard Oil Co.*, 384 U.S. 224, 229-30, 86 S.Ct. 1427, 16 L.Ed.2d 492 (1966) (construing the Rivers and Harbors Appropriation Act of 1899 to prohibit discharge of oil). Other statutes enacted in the 1970s imposed liability, *inter alia*, for the improper handling, storage and disposal of hazardous wastes. *See, e.g.*, Resource Conservation and Recovery Act of 1976, Pub.L. No. 94-580, 90 Stat. 2795, codified at 42 U.S.C. §§ 6901-6987; Toxic Substances Control Act of 1976, Pub.L. No. 94-469, 90 Stat. 2003, codified as amended at 15 U.S.C. §§ 2601-2629. These statutes clearly telegraphed that environmental regulation was an area of intense federal concern, and that liability could be imposed under federal law.

The possibility of common law liability is also relevant, as the Supreme Court recognized in *Turner Elkhorn*. There, the Supreme Court, in addressing the issue of reasonable expectations, specifically referred to pre-existing state "workmen's compensation principles analogous to those enacted here." *Turner Elkhorn*, 428 U.S. at 15, 96 S.Ct. 2882. So too in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 491, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987), the Supreme Court noted the "Court's hesitance to find a taking when the State merely restrains uses of property that are tantamount to public nuisances. . . ." At common law, Edison and other utilities could have potentially been held liable, under the well-established theories of nuisance and strict liability, for environmental damage and other harms resulting from the uranium processing on their behalf. The utilities should have anticipated that such liability could be imposed by the federal government, particularly since the federal government in a number of environmental statutes had taken pains to approvingly preserve common-law liability, an approval which was extended, for example, by the Supreme Court to common law tort liability for nuclear materials contamination. *See*

Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 251, 104 S.Ct. 615, 78 L.Ed.2d 443 (1984).

When discussing the contours and scope of the common law, the Supreme Court has instructed that it is appropriate for us to look to the pertinent Restatement and other secondary sources.[26] The *Restatement of Torts* has long recognized both injunctive and damages liability for nuisance. Nuisances may be public or private. A public nuisance has been defined as "an activity or a physical condition which endangers the health, safety or property of a considerable number of persons . . . ." *See Restatement (First) of Torts*, Intro. to ch. 40, at 217 (1939).[27] A private nuisance has been defined as "an interference with the use and enjoyment of land, and is a wrong only to persons who have property rights or privileges in the land." *Id.* at 219.[28] Numerous courts have recognized nuisance liability for the failure to contain a variety of hazardous substances in the period before 1969 when the uranium processing began. *See, e.g., Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 238, 27 S.Ct. 618, 51 L.Ed. 1038 (1907) (Holmes, J.) (discharge of sulfurous gas); *Exley v. So. Cotton Oil Co.*, 151 F. 101, 102 (C.C.D.Ga.1907) (seepage of chemically polluted water); *Johnson v. City of Fairmont*, 188 Minn. 451, 247 N.W. 572,

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[26] *See, e.g., Harris Trust & Sav. Bank v. Salomon Smith Barney Inc.*, 530 U.S. 238, 250, 120 S.Ct. 2180, 147 L.Ed.2d 187 (2000) (looking to *Restatement (Second) of Trusts* as source for the common law of trusts); *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 538, 542, 119 S.Ct. 2118, 144 L.Ed.2d 494 (1999) (looking to *Restatement (Second) of Torts* and *Restatement (Second) of Agency* for guidance in interpreting a federal statute).

[27] *See also Restatement (Second) of Torts* § 821B (1979), defining public nuisance as "an unreasonable interference with a right common to the general public."

[28] *See also Restatement (Second) of Torts* § 821D (1979), defining private nuisance as "a nontrespassory invasion of another's interest in the private use and enjoyment of land."

573 (1933) (discharge into stream from sewer and factory); *City of Clanton v. Johnson*, 245 Ala. 470, 17 So.2d 669, 671 (Ala.1944) (defective sewer leaking waste); *Carson v. Hercules Powder Co.*, 240 Ark. 887, 402 S.W.2d 640, 641 (1966) (discharge of industrial waste); *City of Syracuse v. Farmers Elevator, Inc.*, 182 Neb. 783, 157 N.W.2d 394, 399 (1968) (discharge of air pollution by anhydrous ammonia facility).[29]

The utilities could not have had reasonable expectations of escaping liability by claiming that they were mere bystanders to the processing by the United States. Section 427B of the *Restatement (Second) of Torts*, published in 1965, made clear that those arranging for processing of hazardous materials could potentially have been liable under the common law for environmental damages arising from the processing:

> One who employs an independent contractor to do work which the employer knows or has reason to know to be likely to involve . . . the creation of a public or private nuisance, is subject to liability for harm resulting to others from such . . . nuisance.

Id. at § 427B. *See, e.g., Loe v. Lenhardt*, 227 Or. 242, 362 P.2d 312, 318 (1961) (spraying of chemicals by independent

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[29] Professor Keeton makes clear, for example, that damage to the environment can constitute a public nuisance:

> Another general type of "public nuisance" is one that is regarded as such because of its impact on the environment, and therefore the use and enjoyment of private property, now and in the future. . . . The air pollution, the soil pollution, the noise pollution or the water pollution must affect the plaintiff in a substantial way and for that reason constitute a private nuisance. It is not irrelevant that others are affected and that so many others are affected as to constitute a public nuisance. This would mean that the conduct is unreasonable and enjoinable.

W. Page Keeton, *et al.*, *The Law of Torts* 651 (5th ed.1984).

contractor).[30] So too, the utilities could reasonably have anticipated potential strict liability because of the hazardous nature of nuclear fuel. Indeed, at the time that the processing began in 1969, section 519 of the *Restatement (First) of Torts*, published in 1938, recognized strict liability for "ultrahazardous activity," defined as activity that: "(a) necessarily involves a risk of serious harm to the person, land or chattels of others which cannot be eliminated by the exercise of utmost care, and (b) is not a matter of common usage." *Id.* at § 520. By the time the *Restatement (Second) of Torts* was published in 1977, atomic energy was singled out for special attention. Comment g to section 520 of that Restatement, for example, characterized atomic energy as an abnormally dangerous activity, concluding that "[s]ome activities, such as the use of atomic energy, necessarily and inevitably involve major risks of harm to others, no matter how or where they are carried on."[31] For all these reasons we conclude that Edison and the other utilities could not have reasonably expected that Congress would not enact legislation imposing remediation costs on the utilities submitting uranium for processing.

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[30] *See also, e.g.*, 7 Stuart M. Speiser, *et al.*, *The American Law of Torts* § 20.16, at 124 (1990) ("[A]s a general rule—all persons who do participate either in the creation or maintenance of a nuisance are liable for injuries suffered therefrom by others."); 58 Am.Jur.2d *Nuisances* § 132, at 772 (1989) ("[A]n employer cannot escape liability by employing an independent contractor to do the work, where a nuisance will result from the performance of such work in the ordinary manner.... Furthermore, it is immaterial in determining liability for nuisance that the employer refrains from directing the . . . contractor in the execution of the work procured to be done.").

[31] *See also Restatement (Second) of Torts* § 520 cmt. h, at 39 (1977) ("There is probably no activity, unless it is perhaps the use of atomic energy, from which all risks of harm could not be eliminated by the taking of all conceivable precautions, and the exercise of the utmost care, particularly as to the place where it is carried on.").

The parties have paid little attention to the reasonable expectations of utilities that did not submit uranium for processing but instead purchased enriched uranium from other utilities and then used it in their own reactors. With respect to this material, Congress confronted a choice between assessing the beneficiaries of the processing (that is, the ultimate users of the SWUs) or those utilities that submitted the uranium for processing and then sold it. We conclude that the utilities could have reasonably expected that Congress might impose the assessment on those most directly benefited-that is, the ultimate SWU users.

Despite the existence of these liability risks, Edison appears to argue that the utilities that submitted uranium for processing had no reasonable expectation that liability would be imposed. (On appeal, Edison does not separately address the expectations of the purchasers of already-processed uranium.)

First, it urges that, even if the contracts did not bar the imposition of liability, they led Edison to believe that it would escape liability. In other words, Edison claims that it was lulled into believing that no liability would be imposed. This seems to us little more than an effort to reargue the very contention rejected in *Yankee Atomic*—namely, that the special assessments essentially constituted impermissible retroactive price increases to the utility's fixed-price contracts with the government. As we held there, the contracts said nothing about freedom from possible regulation or its monetary consequences. *Yankee Atomic*, 112 F.3d at 1579. Edison and the other utilities are presumed to have been aware that under well-established principles going back more than a century these contracts could not deprive the United States of the authority to regulate in the area, and could not impose contract liability for such regulation absent an unmistakable promise, which we have held did not exist. *See Winstar*, 518 U.S. at 874, 116 S.Ct. 2432; *Jefferson Branch*

Bank v. Skelly, 66 U.S. (1 Black) 436, 446, 17 L.Ed. 173 (1861) ("[N]either the right of taxation, nor any other power of sovereignty, will be held . . . to have been surrendered, unless such surrender has been expressed in terms too plain to be mistaken."). Edison cannot properly rely on the contracts as shielding it from liability. Indeed, we specifically held in *Atlas* that the mere existence of a fixed price in a government contract cannot create expectations that the government will not use its sovereign power to impose additional costs. *Atlas*, 895 F.2d at 754.

Second, Edison also contends that it was led to believe by government officials that the contract price included remediation costs. Significantly, Edison does not allege that those officials represented that regulatory legislation would not be enacted.[32] Even if such promises or representations had been made about subsequent regulatory assessments, those authorities had no authority to bind the government.

Third, Edison complains that the contamination resulted from the government's failure to dispose of the uranium processing byproducts in a manner that would have avoided remediation costs. No such allegation appears in the complaint, and, even if it had, there is no allegation that Edison and the other utilities were reasonably unaware of the government's waste-disposal methods when it submitted the uranium for processing.

Fourth, Edison argues that it could not anticipate liability because title to the (unenriched) uranium passed from the utilities to the government during the time that the uranium

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[32] In its amended complaint, Edison alleges in pertinent part that "the Government expressly represented to its customers, and to Congress, that its prices [for the processing services] not only included provisions for [decontamination and decommissioning] expense, but that [decontamination and decommissioning] costs would also be recovered from future sales." Complaint at ¶ 34.

was processed at the government-owned plants and back to the utilities only after processing was complete. Edison's argument is essentially that, by temporarily giving up ownership and control of the uranium during processing, those arranging for the processing and receiving uranium after processing should not be liable. We see no basis for the utilities to assume that the technicality of temporary title transfer would necessarily excuse liability that would otherwise exist for those that submitted unenriched uranium for processing and then received enriched uranium after the processing.[33]

Fifth, Edison argues that it could not anticipate liability because the facilities were already largely (if not completely) contaminated when the uranium was processed, and because no significant additional cleanup costs were attributable to the pollution caused by utilities' uranium processing.

Both under the common law and CERCLA, shared liability was well known when multiple parties caused a single injury. *Restatement (First) of Torts* § 879 cmt. a, at 446 (1939); *Restatement (Second) of Torts* § 879 cmt. a, at 324 (1979). So too "[m]ost courts have held [that] CERCLA imposes strict liability and joint and several liability." *Aceto*, 872 F.2d at 1377-78 (collecting cases).

However, Edison argues that both under CERCLA and the common law, in a suit between the responsible parties, liability would be allocated between those responsible parties according to their relative contributions to the cleanup costs,

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[33] *See Northeastern Pharm.*, 810 F.2d at 743 (holding that ownership of a hazardous substance is not required for liability under CERCLA to attach); *Hercules*, 247 F.3d at 720-21 (holding that where "the ownership issue [is] debatable," CERCLA liability may exist because courts have " 'not hesitated to look beyond defendants' characterizations to determine whether a transaction in fact involves an arrangement for the disposal of a hazardous substance.'" (quoting *Aceto*, 872 F.2d at 1381)).

relying on cases and other authority such as *United States v. Hercules, Inc.*, 247 F.3d 706, 715 (8th Cir.2001), *Kerr-McGee Chemical Corp. v. Lefton Iron & Metal Co.*, 14 F.3d 321, 326 (7th Cir.1994), and *Restatement (Second) of Torts* § 433A (1965). Edison effectively argues that it could reasonably have anticipated that it would have had the opportunity to show that the government was 100% responsible.

We do not agree. Under CERCLA and the common law it was notoriously difficult, both as a matter of law and fact, to separate contributions made by particular causes of harm. *See, e.g., Hercules*, 247 F.3d at 717 (observing that under CERCLA "proving divisibility is a very difficult proposition"); *Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 348 (6th Cir.1998) ("Given the nature of hazardous waste disposal, rarely if ever will a [potentially responsible party] be able to demonstrate divisibility of harm, and therefore joint and several liability is the norm [under CERCLA].") [34]; *Restatement (Second) of Torts* § 433A cmt. i ("Certain kinds of harm, by their very nature, are normally incapable of any logical, reasonable or practical division."). Under these circumstances the utilities should reasonably have expected that Congress might conclude that Edison and the other utilities did in fact make a major contribution to the cleanup costs and that they should share responsibility. The statute here does not impose all liability on the utilities. They are required to pay less than approximately one-third of the

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[34] *See also Kalamazoo River Study Group v. Menasha Corp.*, 228 F.3d 648, 658 (6th Cir.2000) (holding that the district court erroneously required the plaintiff to show that each defendant's discharge of hazardous waste was causally linked to an incurrence of response costs and that the correct standard does not include a specific causation requirement, but only that a plaintiff prove that a release of hazardous substances has occurred; that the release caused the plaintiff to incur "necessary costs of response"; and that each defendant is a potentially responsible party).

cost, with the remainder being borne by the government. And even this liability may be passed on to the customers of the utilities to the extent that the utilities' rates are established by traditional rate-making.

In any event, Edison misses the larger point in arguing that CERCLA or the common law would not be construed to impose liability in similar circumstances. The reasonable expectations test does not require that the law existing at the time of processing would impose liability, or that liability would be imposed only with minor changes in then-existing law. The critical question is whether extension of existing law could be foreseen as reasonably possible. Given the broad scope of CERCLA and the common law, we have no doubt that such an extension was easily foreseen, not necessarily as a certainty, but as a reasonable possibility.

In light of Edison's receipt of benefits, the proportionate nature of its liability, and its reasonable expectations, we conclude that its amended complaint failed to state a Due Process claim for which relief may be granted. We also conclude that EPACT is otherwise constitutional.[35]

CONCLUSION

For the foregoing reasons, the decision of the Court of Federal Claims dismissing the complaint for failure to state a claim is affirmed. The appeal from the denial of the stay is dismissed as moot.

AFFIRMED.

COSTS

No costs.

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[35] This case does not raise an equal protection challenge to EPACT. Such a claim was made and is rejected in *Maine Yankee Atomic Power Co. v. United States*, No. 99-5156, 2001 WL 1472668 (Fed.Cir. Nov.20, 2001), which we decide today.

MAYER, *Chief Judge*, with whom *Circuit Judges* NEWMAN and RADER join, dissenting.

For the reasons set forth in Judge Friedman's opinion in *Maine Yankee Atomic Power v. United States*, Nos. 99-5156, -5158, -5160, also issued today, I would reverse the judgment of the Court of Federal Claims to the extent it rejected the due process challenge to the assessment. I also believe the assessment is an illegal exaction. Therefore, I would overrule *Yankee Atomic Electric Co. v. United States*, 112 F.3d 1569 (Fed.Cir.1997), in accordance with my dissent in that case. 112 F.3d at 1582-85.

APPENDIX D

UNITED STATES COURT OF APPEALS
FEDERAL CIRCUIT

Nos. 96-5021, 96-5025.

YANKEE ATOMIC ELECTRIC COMPANY,
Plaintiff/Cross-Appellant,

v.

THE UNITED STATES,
Defendant-Appellant.

May 6, 1997

Rehearing Denied; Suggestion for Rehearing In Banc Declined Aug. 15, 1997.*

Before MAYER, LOURIE, and CLEVENGER, *Circuit Judges.*

CLEVENGER, *Circuit Judge.*

This case requires us to decide whether, in light of prior contracts specifying the price to be paid for uranium enrichment services, the Government may impose upon domestic utilities a special assessment to aid in funding the clean-up costs associated with the facilities that provided those enrichment services.

The United States appeals the decision of the United States Court of Federal Claims, *Yankee Atomic Electric Co. v. United States*, 33 Fed. Cl. 580 (1995), granting summary judgment to Yankee Atomic Electric Company (Yankee

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* Circuit Judge Newman would rehear the appeal in banc.

Atomic). In that decision, the court determined that the assessment imposed upon Yankee Atomic to fund clean-up costs constitutes an unlawful exaction because it violates the Government's earlier contractual agreements to supply enriched uranium at fixed prices. We conclude that the assessment was lawful and therefore reverse.

I

As both parties acknowledge, the salient facts are not in dispute. Yankee Atomic was organized in 1954 by a number of existing utility companies in an effort to participate in the use of atomic energy as an alternative-source fuel for generating electricity. Yankee Atomic produced electricity using nuclear fuels and sold the resulting electricity to the organizing utilities, which, in turn, sold it to retail customers.

Yankee Atomic's operations required an enriched form of uranium, which was produced by separating useful isotopes of uranium from other isotopes. Beginning in 1963, Yankee Atomic purchased the uranium enrichment (or separation) services from the Government through a series of contracts. Those services were provided at enrichment plants operated first by the Atomic Energy Commission (AEC or Commission) and later by the Energy Research and Development Administration and the Department of Energy (all collectively DOE). Although these contracts varied somewhat from one to another, they each stated that the price paid by Yankee Atomic for the enrichment services would be based on "established Commission pricing policy," which was defined as the price in effect at the time the service was provided. There is no dispute that the Government fulfilled its contractual obligation to provide the enrichment services, and that Yankee Atomic fulfilled its obligation to pay the price in effect at that time.

In the late 1980s, Congress determined that it had to restructure the Government's uranium enrichment services in order to remain competitive with enrichment services

provided by other parties. It did so by creating a new, for-profit, governmental corporation called the United States Enrichment Corporation. At the same time, Congress realized that there would be large costs associated with decontaminating and decommissioning the facilities that had previously been used to provide enrichment services. The Department of Energy estimated that the total cost of this clean up could exceed $20 billion over 40 years, which amounted to about $500 million per year, indexed to inflation. H.R.Rep. No. 474, pt. VIII, at 77 (1992), *reprinted in* 1992 U.S.C.C.A.N. 2282, 2295. Because this decontamination and decommissioning fiscal problem was not recognized until the 1980s, the prices charged in the Government's past uranium enrichment contracts had not accounted for the problem.

This clean-up problem was one of many energy-related issues that Congress addressed in the Energy Policy Act of 1992 (Energy Policy Act or Act). The Act establishes an account to be known as the Uranium Enrichment Decontamination and Decommissioning Fund (Fund), which, over a 15-year period, would accumulate the monies required to clean up the old uranium enrichment plants. The Act provides that the annual deposits of $480 million (adjusted for inflation), will come from two sources: (i) up to $150 million is to be collected as a special assessment from domestic utility companies; and (ii) the balance, at least $330 million, is to come from public funds appropriated by Congress.

The Act further provides that each utility is responsible for a pro-rata share of the total annual assessment based on the percentage of uranium enrichment work units it previously purchased from the DOE relative to the total number of work units previously produced by the DOE. The Act states that a utility is considered to have purchased a work unit from the DOE if the work unit was originally produced by DOE, even if the utility actually purchased it from another source. Similarly, a utility is not considered to have purchased a work

unit from the DOE if it resold that work unit to another utility.[1] In sum, the Act imposes the assessment upon whichever utility company eventually uses the enrichment services.

Following the passage of the Act in October 1992, the DOE sought to assess Yankee Atomic's share of the annual special assessment. Yankee Atomic responded by arguing to the DOE that it should be exempted from the assessment because its facilities had shut down before passage of the Act. When the DOE rejected this argument, Yankee Atomic paid approximately $3 million pursuant to three annual assessments, and filed a lawsuit in the Court of Federal Claims seeking recovery of those payments.

II

Upon cross-motions for summary judgment, the Court of Federal Claims ruled in favor of Yankee Atomic. The court rejected the Government's contention that the special assessment was a lawful exercise of Congress's taxing power under the sovereign acts doctrine. The court explained that although the sovereign acts doctrine would have some force if the case involved a general tax that fell on all utilities alike, it had no impact in the present case which involves an assessment that "reaches only those utility companies that previously had contracted with the Government for the purchase of uranium enrichment services." Accordingly, the court viewed the special assessment as a unilateral retroactive increase in the price previously charged by the Government for its uranium enrichment services.

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[1] These provisions were designed to take into account the secondary market that existed for uranium enrichment services, wherein some utilities purchased uranium enrichment work units from the Government and resold them to other utilities. Yankee Atomic purchased a portion of its uranium enrichment services through this secondary market, but does not assert any breach of contract, taking, or unlawful exaction claim concerning its monetary liability under the Act for those purchases.

The court explained that such a retroactive price increase would constitute an unlawful exaction in view of the prior contracts between the Government and Yankee Atomic. Because those prior contracts specified a fixed price for the uranium enrichment services, the "economic benefit which [Yankee Atomic] gained by virtue of the Government's promise, being a benefit enforceable at law, thus became a property interest that fell beyond the reach of the Government's power to take away." 33 Fed. Cl. at 585.

Based on this conclusion, the court granted Yankee Atomic's motion for summary judgment without addressing Yankee Atomic's argument that it was exempt from the assessment because its facilities had closed before passage of the Act. We review the Government's appeal, and Yankee Atomic's cross-appeal, from the judgment of the Court of Federal Claims pursuant to 28 U.S.C. § 1295(a)(3) (1994).

III

The decision of the Court of Federal Claims is driven by its characterization of the special assessment as a retroactive price increase rather than an exercise of the sovereign's taxing power, and the parties' dispute over this characterization frames the dispositive issue of this appeal.

The Government's principal argument is that the special assessment is entirely distinct from the prior contracts between the DOE and utility companies such as Yankee Atomic. The Government notes that those earlier contracts concerned uranium enrichment, whereas this assessment concerns decontamination and decommissioning. As a result, the Government asserts that the assessment cannot constitute a breach of those earlier contracts unless those contracts contained an express provision that precluded the Government from imposing an assessment to fund decontamination and decommissioning costs.

Yankee Atomic disagrees with the Government's characterization of the assessment and contends that it is directly related to the earlier contracts. Yankee Atomic contends that the fixed-price nature of those contracts expressly limited its obligation to the price already paid, and shifted the risk of any additional costs (including decontamination and decommissioning costs) onto the Government. Yankee Atomic argues that the assessment breaches those contracts by, in effect, retroactively increasing the price that it must pay for the previously supplied uranium enrichment services.[2]

Resolution of this disputed characterization requires us to consider and apply two related bodies of law: the sovereign acts doctrine and the unmistakability doctrine. We consider each in turn.

IV

The sovereign acts doctrine stems from a series of decisions by the Court of Claims, and was first recognized by the United States Supreme Court in *Horowitz v. United States*, 267 U.S. 458, 45 S.Ct. 344, 69 L.Ed. 736 (1925). In that case, Horowitz submitted a bid to buy certain Habutai silk offered for sale by the Government. The Government agreed that Horowitz would be given the opportunity to re-sell the silk before paying the purchase price, and agreed to

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[2] Throughout its briefs, Yankee Atomic contends that the special assessment constitutes a breach of its contracts with the Government. Technically, however, this does not appear to be a case involving a breach of contract. Typically, a contract breach occurs while the contract is being performed, whereas the contracts in the present case have been fully performed by both parties. This appears to have been the view of the Court of Federal Claims, as indicated by the notable absence in its opinion of any reference to breach of contract. This distinction does not affect our decision, however. Regardless of whether the situation is characterized as a breach of contract, an unlawful taking, or an unlawful exaction, the arguments stem from Yankee Atomic's prior contracts with the Government.

ship the silk within a day or two after shipping instructions were given. *Id.* at 459, 45 S.Ct. at 344. Horowitz sold the silk to a silk company, paid the balance of the purchase price, and requested that the silk be shipped to the silk company at once. Because of a governmental embargo placed on the shipment of silk by freight, however, the silk was not shipped for several weeks. By the time it arrived, the price of silk had dropped significantly, and the consignee refused to accept delivery. As a result, Horowitz was forced to sell the silk at a loss. *Id.* at 460, 45 S.Ct. at 344.

Horowitz sued the United States, contending that the embargo breached the valid contract he had for sale and shipment of the silk. The United States Supreme Court rejected this argument because "[i]t has long been held by the Court of Claims that the United States when sued as a contractor cannot be held liable for an obstruction to the performance of the particular contract resulting from its public and general acts as a sovereign." *Id.* at 461, 45 S.Ct. at 344. The Court adopted the reasoning of the Court of Claims:

> The two characters which the government possesses as a contractor and as a sovereign cannot be thus fused; nor can the United States while sued in the one character be made liable in damages for their acts done in the other. *Whatever acts the government may do, be they legislative or executive, so long as they be public and general, cannot be deemed specially to alter, modify, obstruct or violate the particular contracts into which it enters with private persons.* . . . In this court the United States appear simply as contractors; and they are to be held liable only within the same limits that any other defendant would be in any other court. Though their sovereign acts performed for the general good may work

> injury to some private contractors, such parties gain nothing by having the United States as their defendants.

Id. (quoting *Jones v. United States*, 1 Ct.Cl. 383, 384 (1865)) (emphasis added).[3]

The Supreme Court recently discussed *Horowitz*, and the sovereign acts doctrine in general, in *United States v. Winstar Corp.*, 518 U.S. 839, 116 S.Ct. 2432, 135 L.Ed.2d 964 (1996).[4] In *Winstar*, the plurality explained that the doctrine is designed to distinguish between the Government's twin roles as contractor and sovereign. *Id.* at ___, 116 S.Ct. at 2463. When the Government enters into a contract, "its rights and duties therein are governed generally by the law applicable to contracts between private individuals." *Id.* at ___-___, 116 S.Ct. at 2464-65. The Government-as-contractor cannot exercise the power of its twin, the

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[3] The Court of Claims expressed this same philosophy in *O'Neill v. United States*, 231 Ct.Cl. 823, 826 (1982), as follows:

> From its earliest days . . . application of the sovereign act[s] doctrine has proceeded from the recognition that in governing the country, the Government's actions, otherwise legal, will occasionally incidentally impair the performance of contracts. Were those contracts exclusively between private parties, the party hurt by such governing action could not claim compensation from the other party *for the governing action.* Given the large number of contracts the Government enters, *its* contracts will sometimes be affected by those same governing acts. The policy underlying the sovereign act[s] doctrine is that in those circumstances, *the Government in its contracting role, like its private counterpart, should not incur liability for its act done in the governing role.*

[4] The sovereign acts doctrine has also been cited in several other cases since *Horowitz*. *See, e.g., Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 145-46, 102 S.Ct. 894, 905-06, 71 L.Ed.2d 21 (1982) (discussing that the petitioners confuse the Tribe's role as commercial partner with its role as sovereign); *Atlas Corp. v. United States*, 895 F.2d 745, 754 (Fed. Cir.1990) (explaining that the Uranium Mill Tailings Radiation Control Act was a sovereign act undertaken for the public good and, therefore, could not form the basis for a party's breach of contract claim).

Government-as-sovereign, for the purpose of altering, modifying, obstructing or violating the particular contracts into which it had entered with private parties. Such action would give the Government-as-contractor powers that private contracting parties lack.

On the other hand, the plurality explained, the Government-as-sovereign must remain free to exercise its powers. For this reason, the early Court of Claims cases "thought it 'grave error' to suppose that 'general enactments of Congress are to be construed as evasions of [the plaintiff's] particular contract.'" *Id.* at ___, 116 S.Ct. at 2464 (quoting *Deming v. United States*, 1 Ct.Cl. 190, 191, 1865 WL 2004 (1865)). The sovereign acts doctrine attempts to "balance[ ] the Government's need for freedom to legislate with its obligation to honor its contracts by asking whether the sovereign act is properly attributable to the Government as contractor." [5] *Id.* at ___, 116 S.Ct. at 2465. Thus, it is not a hard and fast rule, but rather a case-specific inquiry that focuses on the scope of the legislation in an effort to determine whether, on balance, that legislation was designed to target prior governmental contracts.

Under the sovereign acts doctrine, therefore, we must decide whether the Government, in enacting the relevant provisions of the Energy Policy Act of 1992, was (i) acting for the purpose of retroactively increasing the price of its earlier contracts with Yankee Atomic (*i.e.*, the legislation was passed for the benefit of the Government-as-contractor) or (ii) acting for the purpose of solving the problem of

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[5] The concurring and dissenting justices agreed with this general statement of the doctrine. Under the facts of *Winstar*, *see infra* section IV.A, only three justices concluded that the congressional act was not a sovereign one (*i.e.*, the act was attributable to the Government-as-contractor). The remaining justices either viewed the act as a sovereign one or decided the case on another basis.

decontamination and decommissioning of uranium enrichment facilities (*i.e.*, the legislation was passed for the benefit of the public). We conclude it was the latter.

As explained above, we must begin by examining the scope of the Energy Policy Act; only then can we determine whether the Act is designed with the purpose of affecting or altering the Government's prior contracts. The Energy Policy Act requires contribution to the Fund from any domestic utility that purchased separative work units from the DOE before the Act's passage. 42 U.S.C. § 2297g-1(c) (1994). Importantly, however, the scope of the Act is not coincident with those domestic utilities that had previously entered into contracts with the DOE for uranium enrichment services, because the Act *does not* require contribution from a utility that contracted with the DOE if that utility re-sold the purchased services to another utility. *See* 42 U.S.C. § 2297g-1(c)(2). In contrast, the Act *does* require contribution from any utility that did not have a contract with the DOE but nonetheless benefited from the DOE's services by purchasing through the secondary market. *See* 42 U.S.C. § 2297g-1(c)(1). Thus, some utility/Government contracts are not embraced by the Act, while some purchases from private entities are covered. The key is whether the purchaser was the ultimate beneficiary of the DOE's services.

The reach of the Act, therefore, makes clear that Congress was not focused on a retroactive increase in the price of the Government's prior contractual agreements. Rather than targeting those utility companies that had prior contracts with the Government, the Act targets whichever utility eventually used and benefited from the DOE's enrichment services. Congress's main purpose was to spread the costs of a problem that it realized only after the contracts had been performed. *Cf. Atlas Corp.*, 895 F.2d at 748 (noting that the dangers and clean-up costs associated with uranium milling operations were not fully recognized until the late 1970s). It did so by dividing the costs between: (i) the Government, which was

responsible for at least $330 million per year to be raised through general appropriations, and (ii) those domestic utilities that benefited from the DOE's uranium enrichment services. Any impact that this approach may have on those utilities with which the Government had prior contracts is "merely incidental to the accomplishment of a broader governmental objective." *See Winstar*, 518 U.S. at ___, 116 S.Ct. at 2466.

In characterizing the essence of the Act, Yankee Atomic focuses only on the provisions that impact those utilities that contracted with the Government and that themselves used the enrichment services. While it is true that Yankee Atomic has no quarrel with the Government over its liability on consumption of enrichment services supplied by nongovernmental entities through the secondary market, that fact cannot render irrelevant the Act's provisions that reach even those utilities that did not contract with the Government. When construing an act of Congress, and especially when determining the essential characteristic of a particular statute, we must observe and understand the statute as a whole. *See Crandon v. United States*, 494 U.S. 152, 158, 110 S.Ct. 997, 1001, 108 L.Ed.2d 132 (1990) ("In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy."); *Richards v. United States*, 369 U.S. 1, 11, 82 S.Ct. 585, 591-92, 7 L.Ed.2d 492 (1962) ("We believe it fundamental that a section of a statute should not be read in isolation from the context of the whole Act."); *In re Nantucket, Inc.*, 677 F.2d 95, 98 (C.C.P.A.1982) ("Each part or section of a statute should be construed in connection with every other part or section so as to produce a harmonious whole, and it is not proper to confine interpretation to the one section to be construed." (citation omitted)). Statutory provisions that are relevant, or as here, controlling, to our interpretation cannot be ignored simply because they are not dispositive to the facts before us.

Similarly, the opinion of the Court of Federal Claims seems to have been mistaken in reasoning: "The [sovereign acts doctrine] argument would have some force if we were dealing with a general tax that fell on all utilities alike. That, however, is not our case. Rather, *this special assessment reaches only those utility companies that previously had contracted with the Government* for the purchase of uranium enrichment services." 33 Fed. Cl. at 585 (emphasis added). As explained above, the special assessment does not reach only those utility companies that previously contracted with the Government; it also reaches those utilities that purchased the services through the secondary market but had *no* contracts with the Government. Ironically, then, the assessment appears to be very similar to what the Court of Federal Claims thought it was not: a general tax that falls proportionally on all utilities that benefited from the DOE's uranium enrichment services.[6]

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[6] To the extent that the Energy Policy Act is designed to spread the costs of a societal problem, it is not unlike other instances where Congress has enacted legislation to spread societal costs. One such example involves the costs of cleaning up hazardous waste under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9601 et. seq. (1994). *See, e.g., United States v. Northeastern Pharmaceutical & Chemical Co.*, 810 F.2d 726 (8th Cir.1986). The defendants in those lawsuits have frequently challenged the retroactive application of CERCLA as a violation of their due process rights and as an unconstitutional taking. The courts, however, have rejected those arguments. *See id.* at 734 (rejecting due process challenge because "Congress acted in a rational manner in imposing liability for the cost of cleaning up such sites upon those parties who created and profited from the sites and upon the chemical industry as a whole").

Yankee Atomic contends that the CERCLA cases, and others like them, are inapposite because they involve the impact of legislation on private parties and therefore do not implicate the Government's self-interest. *See Perry v. United States*, 294 U.S. 330, 350-51, 55 S.Ct. 432, 434-35, 79 L.Ed. 912 (1935). We cite the CERCLA cases not for their insight as to

The broad reach of the Energy Policy Act also distinguishes the present case from two cases upon which Yankee Atomic and the Court of Federal Claims relied: *Lynch v. United States*, 292 U.S. 571, 54 S.Ct. 840, 78 L.Ed. 1434 (1934), and *Perry v. United States*, 294 U.S. 330, 55 S.Ct. 432, 79 L.Ed. 912 (1935).

In *Lynch*, the plaintiffs had entered into agreements with the United States for War Risk Insurance and had paid the prescribed monthly premiums. 292 U.S. at 576, 54 S.Ct. at 842. Congress subsequently enacted the Economy Act which included a clause stating: "All laws granting or pertaining to yearly renewable term insurance are hereby repealed." *Id.* at 575, 54 S.Ct. at 842. The Supreme Court held the legislation unlawful without discussing the sovereign acts doctrine, which is not surprising given that the clause was clearly directed to abrogating past war risk insurance contracts for reasons of economy. As the Court stated: "No doubt there was in March, 1933, great need of economy. . . . But Congress was without power to reduce expenditures by abrogating contractual obligations of the United States." *Id.* at 580, 54 S.Ct. at 844.

In *Perry*, the plaintiff owned a $10,000 government bond which, when redeemed, required the United States to pay in "gold coin of the present standard of value." 294 U.S. at 346-47, 55 S.Ct. at 433. Congress later passed a joint resolution which stated that payment of obligations in gold was against public policy and, therefore, all obligations shall be discharged by payment in currency that is legal tender. *Id.* at 349, 55 S.Ct. at 434. The enactment specifically stated that "provisions for payment in gold, 'contained in any law authorizing obligations to be issued by or under authority of

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Congress's motives in enacting the Energy Policy Act, but rather for their general proposition that the costs of large, unrecognized societal problems are frequently spread among those who benefited from the source of the problem.

the United States,' were repealed." *Id.* Based on this clear expression of an intention to abrogate past contracts, the Court again held the act unlawful without discussing the sovereign acts doctrine.

In sum, *Lynch* and *Perry* both involved situations where the congressional act made clear that its purpose was, at least in part, to abrogate past public contracts. The Energy Policy Act, in contrast, reveals no such purpose of targeting past contracts. Instead, the Act taxes all beneficiaries of the DOE's uranium enrichment services.

Given the focus of the relevant provisions of the Energy Policy Act, we conclude that it constitutes a general exercise of Congress's taxing power for the purpose of addressing a societal problem rather than an act that retroactively increases the price charged to contracting parties for uranium enrichment services. This conclusion does not end our inquiry, however. We must further consider whether the Government, by contract with Yankee Atomic, has surrendered the right to exercise this sovereign power "in terms which admit of no other reasonable interpretation." *Merrion*, 455 U.S. at 148, 102 S.Ct. at 907. This requires us to consider and apply the unmistakability doctrine.

V

As the Supreme Court plurality recently explained in *Winstar*, the modern unmistakability doctrine "marks the point of intersection between two fundamental constitutional concepts." *Winstar*, 518 U.S. at ___, 116 S.Ct. at 2453. One concept, which developed in England, is that of parliamentary sovereignty. This concept posits that because the legislature has absolute authority and acknowledges no superior power, it cannot be bound by acts of a prior legislature. *Id.* The other concept, which developed in the United States, is that legislative power may be limited under certain circumstances. Unlike the absolute power enjoyed by the Parliament in England, the legislature in the United States is "subject to the

overriding dictates of the Constitution and the obligations that it authorizes." *Id.* at ___-___, 116 S.Ct. at 2453-54. One such limitation is that embodied in the Contracts Clause, which prohibits a state from passing any law that impairs the obligation of contracts. *See* U.S. Const., Art. I, § 10, cl. 1. Although the Contracts Clause does not apply to acts of the United States, "it is clear that the National Government has some capacity to make agreements binding future Congresses by creating vested rights. . . . The extent of that capacity, to be sure, remains somewhat obscure." *Winstar*, 518 U.S. at ___, 116 S.Ct. at 2455 (citations omitted).

The modern unmistakability doctrine is a canon of construction that attempts to balance these two somewhat competing concepts by allowing the Government to make agreements that bind future Congresses, but only if those contracts contain an unmistakable promise. Thus, the plurality in *Winstar* summarized the almost 160-year history of the unmistakability doctrine as follows:

> [A] contract with a sovereign government will not be read to include an unstated term exempting the other contracting party from the application of a subsequent sovereign act (including an act of Congress), nor will an ambiguous term of a grant or contract be construed as a conveyance or surrender of sovereign power.

Id. at ___, 116 S.Ct. at 2456.[7]

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[7] The remaining justices in *Winstar* essentially agreed with this formulation of the doctrine, although they disagreed with its application to the facts of that case. The two dissenting justices viewed the doctrine to embody the notion that "a waiver of sovereign authority will not be implied, but instead must be surrendered in unmistakable terms." *Id.* at ___, 116 S.Ct. at 2480 (Rehnquist, J., dissenting). The three concurring justices stated the doctrine as follows:

> [I]t is reasonable to presume (unless the opposite clearly appears) that the sovereign does not promise that none of its multifarious sovereign acts, needful for the public good, will incidentally disable

In *Winstar*, the justices were divided as to whether or not the unmistakability doctrine was even applicable, given the facts of that case. Therefore, we next address the issue of whether the doctrine is applicable under the facts of the present case.

A

The plurality of justices in *Winstar* decided that the unmistakability doctrine was not applicable. *Winstar* involved the fallout from the crisis involving the savings and loan industry in the late 1970s and early 1980s. The Government induced healthy thrifts to merge with ailing ones by agreeing to provide favorable regulatory treatment, which would allow the healthy thrifts to count towards their capitalization requirements certain "supervisory goodwill" generated by the mergers. *Winstar*, 518 U.S. at ___-___, 116 S.Ct. at 2442-43. This scheme, however, was ultimately unsuccessful in resolving the thrift industry crisis. As a result, Congress enacted the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), which required that all thrift institutions no longer use "supervisory goodwill" to meet their capitalization requirements. This immediately caused several thrifts to fall out of compliance with capitalization requirements, thereby making them subject to seizure by thrift regulators. *Id.* at ___, 116 S.Ct. at 2446. The thrifts filed suit claiming breach of contract.

After reciting the history of the unmistakability doctrine, the *Winstar* plurality stated:

> The cases extending back into the 19th-century thus stand for a rule that applies when the Government is subject either to a claim that its contract has surrendered

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it or the other party from performing one of the promised acts. . . . Governments do not ordinarily agree to curtail their sovereign or legislative powers, and contracts must be interpreted in a common-sense way against that background understanding. *Id.* at ___, 116 S.Ct. at 2477 (Scalia, J., concurring).

> a sovereign power (e.g., to tax or control navigation), or to a claim that cannot be recognized without creating an exemption from the exercise of such a power. . . . *The application of the doctrine thus turns on whether enforcement of the contractual obligation would block the exercise of a sovereign power of the Government.*

Id. at ___-___, 116 S.Ct. at 2456-57 (footnote omitted; emphasis added). The plurality held that the doctrine was inapplicable because the contracts with the thrifts did not preclude the Government from later exercising its sovereign powers. Instead, the contracts merely shifted the risk of loss onto the Government, thereby requiring it to "indemnify its contracting partners against financial losses arising from regulatory change." *Id.* at ___, 116 S.Ct. at 2461.

Five justices disagreed with the plurality's conclusion that the unmistakability doctrine was not available simply because the contracts were risk-shifting agreements. The three concurring justices pointed out that the plurality's approach was inconsistent with precedent, which had "not made the availability of these sovereign defenses (as opposed to their validity on the merits) depend upon the nature of the contract at issue." *Id.* at ___, 116 S.Ct. at 2476. Moreover, "[v]irtually every contract operates, not as a guarantee of particular future conduct, but as an assumption of liability in the event of nonperformance." *Id.* Despite this difference, these three justices concurred because they believed that the contracts contained unmistakable promises to continue the favorable regulatory treatment. *Id.* at ___-___, 116 S.Ct. at 2477-78. The two dissenting justices concluded that the doctrine applied and that the contracts did not contain an unmistakable promise against future regulatory change.

Based on the reasoning contained in the *Winstar* opinions, we conclude that the unmistakability doctrine applies in the present case. This conclusion respects the views of the five justices who stated that the application of the doctrine is

unrelated to the nature of the underlying contracts. In addition, our conclusion is in harmony with the views of the plurality justices. To be sure, the contracts at issue in the present case may be viewed as risk-shifting agreements, similar to those that the *Winstar* plurality found not to implicate the unmistakability doctrine. As mentioned above, the contracts at issue are fixed-price contracts, and the Supreme Court has held that "[w]here one agrees to do, for a fixed sum, a thing possible to be performed, he will not be excused or become entitled to additional compensation, because unforeseen difficulties are encountered." *United States v. Spearin*, 248 U.S. 132, 136, 39 S.Ct. 59, 61, 63 L.Ed. 166 (1918). Similarly, our predecessor court has stated that "the [seller] in a fixed-price contract assumes the risk of unexpected costs. In firm fixed-price contracts, risks fall on the [seller], and the [seller] takes account of this through his prices." *ITT Arctic Servs., Inc. v. United States*, 207 Ct.Cl. 743, 524 F.2d 680, 691 (1975) (citations omitted).

Importantly, however, the plurality also expressly stated that application of the unmistakability doctrine turns on whether enforcement of the contractual obligation would effectively block the exercise of a sovereign power of the Government. *Winstar,* 518 U.S. at ___-___, 116 S.Ct. at 2457-58. As explained above, the assessment at issue in the present case is a general, sovereign act. Although Yankee Atomic seeks money damages, its argument would effectively block the exercise of this sovereign power to tax, for if Yankee Atomic were to prevail, the Government would be required to refund the entire amount assessed. This is akin to a tax rebate, which even the plurality seemed to recognize as a block to the exercise of sovereign power. *See id.* at ___, 116 S.Ct. at 2458 ("Granting a rebate, like enjoining enforcement, would simply block the exercise of the taxing power.").

B

Having decided that the unmistakability doctrine applies, we next address the merits of the arguments on that issue. This requires us to decide whether the contracts between Yankee Atomic and the Government unmistakably precluded the Government from subsequently exercising its sovereign power to assess a tax. We conclude that no such promise existed in the contracts.

We begin by noting that none of the contracts expressly states that Yankee Atomic will be immune from any future assessments made by the Government upon the industry as a whole. Yankee Atomic acknowledges the lack of any such express statement, but instead relies on the fixed-price nature of the contract. Yankee Atomic argues that "[t]he fixed-price contract terms are hardly implicit, and they *forbid* a future price increase." Although the contracts include fixed-price terms, we must determine whether those terms unmistakably encompassed future taxes or assessments.

To determine the scope of those fixed price terms, we look to the language of the contracts. Although the language of the several contracts varies somewhat, the contract executed on March 9, 1971, entitled "Agreement For Furnishing Uranium Enrichment Services" is representative. Article III of that agreement provides, in part:

> 1. The charges to be paid to the Commission for enriching services provided to the Customer hereunder shall be determined in accordance with the established Commission pricing policy for such services; provided, however, that the unit charge for enriching services during the term of this agreement shall in no event exceed a ceiling charge of $30.00 (subject to possible adjustment [for labor and power costs] pursuant to Section 3 of this article) per Kg unit of separative work for separation of U-235 from U-238, as defined in the established Commission pricing policy.

From examining the contracts, we decide that the fixed-price terms of the contract do not constitute an unmistakable promise on behalf of the Government that it will not impose a general assessment upon all utility companies that benefited from the DOE's uranium enrichment services. The language of the contract is directed at the prices charged for providing enriched uranium to Yankee Atomic, and not to any decontamination or decommissioning costs which may subsequently arise. Thus, the contract states that "[t]he charges [are] to be paid to the Commission *for enriching services provided*," and sets a ceiling price of $30 per Kg unit "for separation of U-235 from U-238."

The Government complied with this provision by providing the enriched uranium at the agreed-upon price. At that point, the contract was fully performed by both parties. This gave Yankee Atomic a vested contract right which would then bar the Government from deliberately attempting to charge more for performance of those contracts. As explained above in the sovereign acts doctrine discussion, however, the subsequent assessment is not a deliberate retroactive increase in the price of those contracts. Instead, it is the Government's way of spreading the costs of the later discovered decontamination and decommissioning problem on all utilities that benefited from the Government's service, whether or not those services were acquired by contract from the Government.

The opinion of the Court of Federal Claims is not clear as to whether or not it discerned an unmistakable promise that barred the subsequent special assessment. On the one hand, after reciting several unmistakability doctrine cases, the court stated: "*But even where a contract does not contain language securing protection from the potentially disruptive effects of subsequent legislation*, exercise of the sovereign power does not proceed unchecked." 33 Fed. Cl. at 584. The under-scored portion of this statement indicates that the court viewed the contracts as containing no unmistakable promise that precluded the Government from later imposing an assessment.

On the other hand, the court's opinion can be read to indicate that it found such an unmistakable promise. The court explained that the congressional acts required the AEC to charge prices that assured reasonable compensation to the Government, which was later defined as recovery of the Government's costs over a reasonable period of time. Based on these legislative mandates, the court stated: "[i]n short, there was no want of authority in the administering agency to price the Government's services so as to recapture, over time, all costs associated with the delivery of those services." 33 Fed. Cl. at 584. This indicates that the court implied an unmistakable promise from legislative mandates. To the extent that the Court of Federal Claims implied an unmistakable promise from the legislative acts, we conclude it erred. Put simply, a specific promise implied from general legislative acts is not an unmistakable one.

Therefore, we conclude that the contracts between Yankee Atomic and the Government did not include an unmistakable promise that precluded the Government from later imposing an assessment upon all domestic utilities that employed the DOE's uranium enrichment services.[8]

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[8] Our conclusion on this point also resolves Yankee Atomic's takings argument. Because the contracts did not contain an unmistakable promise against a future assessment, Yankee Atomic had no property right (via a vested contract right) which was subsequently taken by the assessment. At most, Yankee Atomic has a vested right to be immune from later attempts to retroactively increase the prices charged. This right has not been taken because, as explained in the sovereign acts discussion, the assessment is a general, sovereign act rather than a retroactive price increase. For the same reason, *Lynch* and *Perry* are inapposite. In each of those cases, the Government's action directly abrogated prior vested contractual rights. *See Winstar*, 518 U.S. at ___, 116 S.Ct. at 2455 (stating that "it is clear that the National Government has some capacity to make agreements binding future Congresses by creating vested rights," and citing *Perry* and *Lynch*).

VI

Yankee Atomic also contends that even if we should rule against it on its contractual arguments, it should nonetheless prevail on its statutory argument. Yankee Atomic argues that the Energy Policy Act applies only to "domestic utilities," and that the meaning of that term is provided by the following language:

> Any special assessment levied under this section on domestic utilities for the decontamination and decommissioning of the Department's gaseous diffusion enrichment facilities shall be deemed a necessary and reasonable current cost of fuel and shall be fully recoverable in rates in all jurisdictions in the same manner as the utility's other fuel cost.

42 U.S.C. § 2297g-1(g). Yankee Atomic argues that this language plainly indicates that "domestic utility" encompasses only those utilities that are currently generating and selling electricity. Because Yankee Atomic ceased operation eight months before passage of the Act, it is not a "domestic utility." As a result, Yankee Atomic asserts that the entire assessment, including that levied on Yankee Atomic's purchase in the secondary market, would constitute an unlawful exaction. We disagree with this argument.

The plain language of the Energy Policy Act explains which utilities are covered by its scope. The Act clearly states that "[t]he Secretary shall collect a special assessment from domestic utilities." 42 U.S.C. § 2297g- 1(c). The Act further states that a utility is responsible for contribution to the Decontamination and Decommissioning Fund if it purchased uranium enrichment services from the DOE, either directly or indirectly, but utility company. 42 U.S.C. §§ 2297g-1(c)(1), (2). Thus, the plain language of the statute sets the parameters of its scope. Because Yankee Atomic purchased uranium enrichment services from the DOE, both directly and indirectly, it falls within the Act's scope.

The provision cited by Yankee Atomic, § 2297g-1(g), does not contradict this plain meaning. That provision merely addresses the issue of how the special assessment should be treated in determining utility rates. By defining the assessment as a current cost of fuel, Congress clears the path for the domestic utilities to pass through the assessment to current customers. This avoids any complications from the Federal Energy Regulatory Commission, which has ruled that although customers can be charged for current fuel costs, they cannot be charged for certain prior costs. *See, e.g., Northern States Power Co.*, 58 FERC ¶ 61,119 (Feb. 6, 1992). Section 2297g-1(g) does not, however, *sub silentio* create an exception which takes certain utilities out of the reach of the assessment.

Therefore, we conclude that Yankee Atomic is not exempt from the assessment by virtue of its nonoperating status at the time the Act was passed. The Act plainly defines the scope of the assessment, and Yankee Atomic has not cited any contrary intention by Congress.

VII

In conclusion, the provision of the Energy Policy Act which imposes the special assessment is a sovereign act because it is designed to spread the costs associated with the decontamination and decommissioning over all domestic utilities that used the DOE's uranium enrichment services, rather than targeting only those utilities that had contracts with the Government. Moreover, the contracts between Yankee Atomic and the Government did not contain an unmistakable promise which precluded the Government from exercising this sovereign power. Finally, Yankee Atomic is not exempt from the assessment by virtue of the fact that it ceased operations before the Act's passage. Accordingly, the judgment of the Court of Federal Claims is reversed.

No costs.

REVERSED.

MAYER, *Circuit Judge*, dissenting.

More than a century ago, the Supreme Court held that the government cannot deprive a party with which it contracts "of the fruits actually reduced to possession of contracts lawfully made." *Sinking Fund Cases*, 99 U.S. 700, 720, 25 L.Ed. 496 (1879); *see also Bowen v. Public Agencies Opposed to Soc. Sec. Entrapment*, 477 U.S. 41, 55, 106 S.Ct. 2390, 2398, 91 L.Ed.2d 35 (1986). In levying the special assessments required by 42 U.S.C. § 2297g-1 against Yankee Atomic Electric Company (Yankee), the government improperly diminished the value of Yankee's contractual "fruits." The Court of Federal Claims held that this was an "unlawful exaction," and I agree. I would affirm.

The parties do not dispute that the contracts at issue were fixed-price contracts. "Where one agrees to do, for a fixed sum, a thing possible to be performed, he will not be excused or become entitled to additional compensation, because unforeseen difficulties are encountered." *United States v. Spearin*, 248 U.S. 132, 136, 39 S.Ct. 59, 61, 63 L.Ed. 166 (1918); *Dalton v. Cessna Aircraft Co.*, 98 F.3d 1298, 1305 (Fed.Cir.1996) ("Because fixed-price contracts do not contain a method for varying the price of the contract in the event of unforeseen circumstances, they assign the risk to the [seller] that the actual cost of performance will be higher than the price of the contract."). As the seller of uranium enrichment services, the government bore the risk of any unforeseen difficulties or increased costs that might arise out of its performance of the contracts.

The parties also agree that the contracts were fully and satisfactorily performed. Once a contract is completed, the contractual relationship ends and there is no privity between the parties. *M. Bianchi of Cal. v. Perry*, 31 F.3d 1163, 1167-68 (Fed.Cir.1994); *John J. Kirlin, Inc. v. United States*, 827 F.2d 1538, 1541 (Fed.Cir.1987). Consequently, Yankee cannot prevail on its claim that the government breached the

contracts at issue years after they were finished. *See Mulholland v. United States*, 175 Ct.Cl. 832, 361 F.2d 237, 239-40 (1966) (at the latest, a breach of contract claim accrues when the contract is completed); *cf. Henke v. United States*, 60 F.3d 795, 799-800 (Fed.Cir.1995).

Contracts, however, are property, "whether the obligor be a private individual, a municipality, a State, or the United States. Rights against the United States arising out of a contract with it are protected by the Fifth Amendment" of the United States Constitution. *Lynch v. United States*, 292 U.S. 571, 579, 54 S.Ct. 840, 843, 78 L.Ed. 1434 (1934); *see also Bowen*, 477 U.S. at 52, 106 S.Ct. at 2396-97 (the government "has the power to enter contracts that confer vested rights, and the concomitant duty to honor those rights"); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003, 104 S.Ct. 2862, 2873, 81 L.Ed.2d 815 (1984) ("[V]alid contracts are property within meaning of the Taking Clause."); *Thorpe v. Housing Auth. of Durham*, 393 U.S. 268, 278 n. 31, 89 S.Ct. 518, 524 n. 31, 21 L.Ed.2d 474 (1969). The Fifth Amendment prohibits the federal government from depriving a person of property "without due process of law" and from taking private property "without just compensation." U.S. Const. amend. V; *Lynch*, 292 U.S. at 579, 54 S.Ct. at 843; *cf. Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 163-64, 101 S.Ct. 446, 452, 66 L.Ed.2d 358 (1980) (where state collected a service charge, subsequently-imposed fee for the same service was an unconstitutional taking).

The government does not contend that its contracts with Yankee were invalid. So, there can be no doubt that once Yankee's contracts had been satisfactorily performed, its rights under those contracts were fully-vested property rights. Consequently, the government cannot deprive Yankee of the benefits of those contracts. *See Sinking Fund Cases*, 99 U.S. at 720.

To ascertain Yankee's vested property rights, we must look to the contracts themselves. The bargain struck between the

government and Yankee was simple. The government, through the Atomic Energy Commission and its successor agencies, was to provide uranium enrichment or separation services for Yankee. In return, Yankee was to pay a fixed price per separative work unit, the common measure by which uranium enrichment services are sold. Between 1963 and 1983, Yankee purchased approximately 804,000 separative work units at prices ranging from less than $26 to more than $149 per unit. Because of the fixed-price nature of these contracts, Yankee was entitled to pay no more than the agreed-upon price. The government, on the other hand, was assigned the risk for any unforeseen difficulties that might arise or the risk that actual performance costs would be higher than the contract price.

The sole basis upon which Congress imposed the special assessments which Yankee seeks to recover is that Yankee had purchased uranium enrichment services from the government. These assessments were calculated based on the percentage of the total separative work units produced by the government which Yankee had purchased directly. This is tantamount to a retroactive price increase. It levies a charge on Yankee solely because it had previously purchased enrichment services from the government. But those purchases were made via fixed-price contracts. The assessment effectively requires Yankee to pay for the additional costs the government incurred as a result of performing uranium enrichment services; the very same costs for which the government assumed the risk. Thus, the government retroactively abrogated the essence of the contracts at issue. "But Congress [is] without power to reduce expenditures by abrogating contractual obligations of the United States. To abrogate contracts, in the attempt to lessen government expenditure would be not the practice of economy, but an act of repudiation." *Perry*, 294 U.S. at 352-53, 55 S.Ct. at 436.

It is of no moment that the reason for the assessment is to relieve the government from shouldering entirely the

unforeseen costs incurred in providing those services, from which Yankee had benefited. Yankee fully paid the government for those benefits, and as the seller of the enrichment services, the government bore the burden for any unforeseen costs. The Fifth Amendment "was designed to bar Government from forcing some people alone to bear public burdens which . . . should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49, 80 S.Ct. 1563, 1569, 4 L.Ed.2d 1554 (1960); *cf. United States v. Winstar Corp.*, 518 U.S. 839, ___, 116 S.Ct. 2432, 2459, 135 L.Ed.2d 964 (1996) (the government may not "simply shift costs of legislation onto its contractual partners who are adversely affected by the change in the law, when the Government has assumed the risk of such change").

Nor is it of any great import that the assessment is levied on some utilities that did not contract directly with the government. First, that is not the case before us. Yankee seeks to recover only assessments based on its direct purchases from the government. It does not challenge charges based on secondary market purchases, which, according to the government at argument, constitute just 15% of the total assessments. Moreover, the same argument, that legislation was not targeted solely at those with whom the government had contracted, was made by the government and rejected by the Court in *Winstar*. "Legislation can almost always be written in a formally general way, and the want of an identified target is not much security when a measure's impact nonetheless falls substantially upon the Government's contracting partners." 518 U.S. at ___, 116 S.Ct. at 2468. The government concedes that 85% of the special assessment falls on utilities that had procured enrichment services directly from the government. Clearly then, the assessment's impact falls substantially on the government's contracting partners. That a small fraction of others who indirectly

purchased enrichment services from the government also must pay the assessment does not mask its true identity as a retroactive price increase.

The government invokes the familiar sovereign acts and unmistakability doctrines in support of its position that the special assessment did not abrogate Yankee's vested contract rights. Neither shields the government.

The sovereign acts doctrine provides that "the United States when sued as a contractor cannot be held liable for an obstruction to the performance of the particular contract resulting from its public and general acts as a sovereign." *Horowitz v. United States*, 267 U.S. 458, 461, 45 S.Ct. 344, 344, 69 L.Ed. 736 (1925). "[T]he essential point [of the doctrine is] to put the Government in the same position that it would have enjoyed as a private contractor." *Winstar*, 518 U.S. at ___, 116 S.Ct. at 2463. This doctrine is wholly inapplicable. Properly understood, it is a government defense to breach of contract and other contractor claims that a governmental act adversely affected contract performance. But this is not a breach of contract case. Nor did Congress' enactment of the special assessment obstruct performance of the contracts, as contemplated by *Horowitz*. The contracts were fully and successfully performed by both parties. But even assuming the doctrine applied, it would not insulate the government from liability because the impact of the special assessment falls so substantially and directly on Yankee and the government's other contractors. *See Winstar*, 518 U.S. at ___, 116 S.Ct. at 2469 ("[T]he extent to which [the legislation there at issue] relieved the Government of its own contractual obligations precludes a finding that the statute is a 'public and general' act for purposes of the sovereign acts defense.").

The unmistakability doctrine, on the other hand, is simply a "canon of contract construction," *Winstar*, 518 U.S. at ___, 116 S.Ct. at 2448, which says that "a contract with a sovereign government will not be read to include an unstated

term exempting the other contracting party from the application of a subsequent sovereign act (including an act of Congress)," *id.* at ___, 116 S.Ct. at 2456. Its application "turns on whether enforcement of the contractual obligation alleged would block the exercise of a sovereign power," such as the power to tax. *Id.* at ___, 116 S.Ct. at 2457. But this doctrine too is inapplicable. It is not enforcement of a "contractual obligation," per se, that is at issue. Rather, Yankee seeks reimbursement for the improper abrogation of its vested property rights, which happened to arise out of the completed contracts. That is, it seeks money damages for the government's deprivation "of the fruits actually reduced to possession" of the contracts at issue. *See Sinking Fund Cases*, 99 U.S. at 720.

Even assuming, for the sake of argument, the unmistakability doctrine applied, it adds little. The parties agree that the contracts, out of which Yankee's property rights arose, had fixed prices and that the government bore the risk of unforeseen costs that might arise. They merely disagree about the legal consequences that flow from this interpretation. But Yankee needed no more than the fixed-price contract terms to insulate itself from a post-performance price hike. It did not need an additional, second promise not to have the contract price increased after completion. *See Winstar*, 518 U.S. at ___, 116 S.Ct. at 2461 (there is "no need for an unmistakably clear 'second promise' "); *id.* at ___, 116 S.Ct. at 2477 (Scalia, Kennedy, Thomas, JJ., concurring) (there need be no "*further* promise not to go back on the promise" made).

That is not to say that Yankee would be immune from every assessment or tax relating to decontaminating and decommissioning the government enrichment facilities, no matter how general or broad its application, solely because it had a fixed-price contract. But where, as here, the impact of

the tax falls so substantially and directly on Yankee and the government's other contracting partners, it amounts to a retroactive price increase, which cannot stand.

When the government improperly exacts or takes one's money "'in contravention of the Constitution, a statute, or a regulation,'" an illegal exaction has occurred, and the payor is entitled to recoupment. *Aerolineas Argentinas v. United States*, 77 F.3d 1564, 1572-73 (Fed.Cir.1996); *Eastport S.S. Corp. v. United States*, 178 Ct.Cl. 599, 372 F.2d 1002, 1007 (1967). In other words, "an illegal exaction has occurred when 'the Government has the citizen's money in its pocket.' "*Aerolineas Argentinas*, 77 F.3d at 1573 (quoting *Clapp v. United States*, 127 Ct.Cl. 505, 512, 117 F.Supp. 576, 580 (1954)). The government has Yankee's money in its pocket. It illegally exacted that money in contravention of Yankee's rights under the Fifth Amendment. Yankee is entitled to recover it.

APPENDIX E

A. PERTINENT PROVISIONS OF EPACT AS ENACTED (PUBLIC LAW 102-486—OCT. 24, 1992)

1. PERTINENT PROVISIONS OF TITLE IX (106 STAT. 2929 *ET SEQ.*)

TITLE IX—UNITED STATES ENRICHMENT CORPORATION

SEC. 901. ESTABLISHMENT OF THE UNITED STATES ENRICHMENT CORPORATION.

The Atomic Energy Act of 1954 (42 U.S.C. §§ 2011 *et seq.*) is amended by adding at the end the following new title:

"TITLE II—UNITED STATES ENRICHMENT CORPORATION

"CHAPTER 22—GENERAL PROVISIONS

* * * *

"SEC. 1202. PURPOSES. [42 U.S.C. § 2297a.]

"The Corporation is created for the following purposes:

"(1) To operate as a business enterprise on a profitable and efficient basis.

"(2) To maximize the long-term value of the Corporation to the Treasury of the United States.

"(3) To lease Department uranium enrichment facilities, as needed.

"(4) To acquire uranium for uranium enrichment, low-enriched uranium for resale, and highly enriched uranium for conversion into low-enriched uranium, as needed.

"(5) To market and sell its enriched uranium and uranium enrichment and related services to—

"(A) the Department for governmental purposes; and

"(B) domestic and foreign persons, as provided in section 1303(6).

"(6) To conduct research and development as required to meet business objectives for the purposes of identifying, evaluating, improving, and testing alternative technologies for uranium enrichment.

"(7) To conduct the business as a self-financing corporation and eliminate the need for Federal Government appropriations or sources of Federal financing other than those provided in this title.

"(8) To help maintain a reliable and economical domestic source of uranium enrichment services.

"(9) To comply with laws, and regulations promulgated thereunder, to protect the public health, safety, and the environment.

"(10) To continue at all times to meet the objectives of ensuring the Nation's common defense and security, including abiding by United States laws and policies concerning special nuclear materials and nonproliferation of atomic weapons and other nonpeaceful uses of atomic energy.

"(11) To take all other lawful actions in furtherance of these purposes.

"CHAPTER 23—ESTABLISHMENT, POWERS, AND ORGANIZATION OF CORPORATION

"SEC. 1301. ESTABLISHMENT OF THE CORPORATION. [42 U.S.C. § 2297b.]

"(a) IN GENERAL.—There is established a body corporate to be known as the United States Enrichment Corporation.

"(b) GOVERNMENT CORPORATION.—The Corporation shall be established as a wholly owned Government corporation subject to chapter 91 of title 31, United States Code (commonly referred to as the Government Corporation Control Act), except as otherwise provided in this title.

"(c) FEDERAL AGENCY.—The Corporation shall be an agency and instrumentality of the United States.

* * * *

"CHAPTER 24—RIGHTS, PRIVILEGES, AND ASSETS OF THE CORPORATION

* * * *

"SEC. 1403. LEASING OF GASEOUS DIFFUSION FACILITIES OF DEPARTMENT. [42 U.S.C. § 2297c-2.]

"(d) DOE RESPONSIBILITY FOR PREEXISTING CONDITIONS—The payment of any costs of decontamination and decommissioning, response actions, or corrective actions with respect to conditions existing before the transition date, in connection with property of the Department leased under subsection (a), shall remain the sole responsibility of the Department.

* * * *

"SEC. 1404. CAPITAL STRUCTURE OF CORPORATION. [42 U.S.C. § 2297c-3.]

"(a) CAPITAL STOCK—

"(1) ISSUANCE TO SECRETARY OF THE TREASURY—The Corporation shall issue capital stock representing an equity investment equal to the greater of—

"(A) $3,000,000,000; or

"(B) the book value of assets transferred to the Corporation, as reported in the Uranium Enrichment Annual Report for fiscal year 1991, modified to reflect continued depreciation and other usual changes that occur up to the transfer date.

The Secretary of the Treasury shall hold such stock for the United States, except that all rights and duties pertaining to management of the Corporation shall remain vested in the Board.

"(2) RESTRICTION ON TRANSFERS OF STOCK BY UNITED STATES—The capital stock of the Corporation shall not be sold, transferred, or conveyed by the United States, except to carry out the privatization of the Corporation under section 1502.

"(3) ANNUAL ASSESSMENT—The Secretary of the Treasury shall annually assess the value of the stock held by the Secretary under paragraph (1) and submit to the Congress a report setting forth such value. The annual assessment of the Secretary shall be subject to review by an independent auditor.

"(b) PAYMENT OF DIVIDENDS—The Corporation shall pay into miscellaneous receipts of the Treasury of the United States or such other fund as is provided by law, dividends on the capital stock, out of earnings of the Corporation, as a return on the investment represented by such stock. Until privatization occurs under section 1502, the Corporation shall

pay as dividends to the Treasury of the United States all net revenues remaining at the end of each fiscal year not required for operating expenses or for deposit into the Working Capital Account established in section 1316.

"(c) PROHIBITION ON ADDITIONAL FEDERAL ASSISTANCE—Except as otherwise specifically provided in this title, the Corporation shall receive no appropriations, loans, or other financial assistance from the Federal Government.

"(d) SOLE RECOVERY OF UNRECOVERED COSTS—Receipt by the United States of the proceeds from the sale of stock issued by the Corporation under subsection (a)(1), and the dividends paid under subsection (b), shall constitute the sole recovery by the United States of previously unrecovered costs (including depreciation and imputed interest on original plant investments in the Department's gaseous diffusion plants) that have been incurred by the United States for uranium enrichment activities prior to the transition date.

* * * *

"SEC. 1406. LIABILITIES. [42 U.S.C. § 2297c-5.]

"(a) LIABILITIES BASED ON OPERATIONS BEFORE TRANSITION.—Except as otherwise provided in this title, all liabilities attributable to operation of the uranium enrichment enterprise before the transition date shall remain direct liabilities of the Department.

"(b) JUDGMENTS BASED ON OPERATIONS BEFORE TRANSITION.—Any judgment entered against the Corporation imposing liability arising out of the operation of the uranium enrichment enterprise before the transition date shall be considered a judgment against and shall be payable solely by the Department.

"(c) REPRESENTATION.—With regard to any claim seeking to impose liability under subsection (a) or (b), the United States shall be represented by the Department of Justice.

"(d) JUDGMENTS BASED ON OPERATIONS AFTER TRANSITION.—Any judgment entered against the Corporation arising from operations of the Corporation on or after the transition date shall be payable solely by the Corporation from its own funds. The Corporation shall not be considered a Federal agency for purposes of chapter 171 of title 28, United States Code.

* * * *

"CHAPTER 25—PRIVATIZATION OF THE CORPORATION

"SEC. 1501. STRATEGIC PLAN FOR PRIVATIZATION. [42 U.S.C. § 2297d.]

"(a) IN GENERAL.—Within 2 years after the transition date, the Corporation shall prepare a strategic plan for transferring ownership of the Corporation to private investors. The corporation shall revise the plan as needed.

"(b) CONSIDERATION OF ALTERNATIVE MEANS OF TRANSFERRING OWNERSHIP.—The plan shall include consideration of alternative means for transferring ownership of the Corporation to private investors, including public stock offering, private placement, or merger or acquisition. The plan may call for the phased transfer of ownership or for complete transfer at a single point of time. If the plan calls for phased transfer of ownership, then—

"(1) privatization shall be deemed to occur when 100 percent of ownership has been transferred to private investors;

"(2) prior to privatization, such stock shall be nonvoting stock; and

"(3) at the time of privatization, such stock shall convert to voting stock.

"(c) EVALUATION AND RECOMMENDATION.—The plan shall evaluate the relative merits of the alternatives

considered and the estimated return on the Government's investment in the Corporation achievable through each alternative. The plan shall include the Corporation's recommendation on its preferred means of privatization.

"(d) TRANSMITTAL.—The Corporation shall transmit copies of the strategic plan for privatization to the President and Congress upon completion.

"SEC. 1502. PRIVATIZATION. [42 U.S.C. § 2297d-1.]

"(a) IMPLEMENTATION.—Subsequent to transmitting a plan for privatization pursuant to section 1501, and subject to subsections (b) and (c), the Corporation may implement the privatization plan if the Corporation determines, in consultation with appropriate agencies of the United States, that privatization will—

"(1) result in a return to the United States at least equal to the net present value of the Corporation;

"(2) not result in the Corporation being owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government;

"(3) not be inimical to the health and safety of the public or the common defense and security; and

"(4) provide reasonable assurance that adequate enrichment capacity will remain available to meet the domestic electric utility industry.

"(b) REQUIREMENT OF PRESIDENTIAL APPROVAL.—The Corporation may not implement the privatization plan without the approval of the President.

"(c) NOTIFICATION OF CONGRESS AND GAO EVALUATION.—The Corporation shall notify the Congress of its intent to implement the privatization plan. Within 30 days of

notification, the Comptroller General shall submit a report to Congress evaluating the extent to which—

"(1) the privatization plan would result in any ongoing obligation or undue cost to the Federal Government; and

"(2) the revenues gained by the Federal Government under the privatization plan would represent at least the net present value of the Corporation.

"(d) PERIOD FOR CONGRESSIONAL REVIEW.—The Corporation may not implement the privatization plan less than 60 days after notification of the Congress.

"(e) DEPOSIT OF PROCEEDS.—Proceeds from the sale of capital stock of the Corporation under this section shall be deposited in the general fund of the Treasury.

* * * *

2. PERTINENT PROVISIONS OF TITLE X (106 STAT. 2946 *ET SEQ.*)

TITLE X—REMEDIAL ACTION AND URANIUM REVITALIZATION

Subtitle A—Remedial Action at Active Processing Sites

SEC. 1001. REMEDIAL ACTION PROGRAM. [42 U.S.C. § 2296a.]

(a) IN GENERAL.—Except as provided in subsection (b), the costs of decontamination, decommissioning, reclamation, and other remedial action at an active uranium or thorium processing site shall be borne by persons licensed under section 62 or 81 of the Atomic Energy Act of 1954 (42 U.S.C. 2091, 2111) for any activity at such site which results or has resulted in the production of byproduct material.

(b) REIMBURSEMENT.—

(1) IN GENERAL.—The Secretary of Energy shall, subject to paragraph (2), reimburse at least annually a licensee described in subsection (a) for such portion of the costs described in such subsection as are—

(A) determined by the Secretary to be attributable to byproduct material generated as an incident of sales to the United States; and

(B) either—

(i) incurred by such licensee not later than December 31, 2002; or

(ii) placed in escrow not later than December 31, 2002, in accordance with a plan for subsequent decontamination, decommissioning, reclamation, and other remedial action approved by the Secretary.

(2) AMOUNT.—

(A) TO INDIVIDUAL ACTIVE SITE URANIUM LICENSEES.—The amount of reimbursement paid to any licensee under paragraph (1) shall be determined by the Secretary in accordance with regulations issued pursuant to section 1002 and, for uranium mill tailings only, shall not exceed an amount equal to $5.50 multiplied by the dry short tons of byproduct material located on the date of the enactment of this Act at the site of the activities of such licensee described in subsection (a), and generated as an incident of sales to the United States.

(B) TO ALL ACTIVE SITE URANIUM LICENSEES.—Payments made under paragraph (1) to active site uranium licensees shall not in the aggregate exceed $270,000,000.

(C) TO THORIUM LICENSEES.—Payments made under paragraph (1) to the licensee of the active thorium site shall not exceed $40,000,000, and may only be made for off-site disposal.

(D) INFLATION ESCALATION INDEX.—The amounts in subparagraphs (A), (B), and (C) of this paragraph shall be increased annually based upon an inflation index. The Secretary shall determine the appropriate index to apply.

(E) ADDITIONAL REIMBURSEMENT.—

(i) DETERMINATION OF EXCESS.—The Secretary shall determine as of July 31, 2005, whether the amount authorized to be appropriated pursuant to section 1003, when considered with the $5.50 per dry short ton limit on reimbursement, exceeds the amount reimbursable to the licensees under subsection (b)(2).

(ii) IN THE EVENT OF EXCESS.—If the Secretary determines under clause (i) that there is an excess, the Secretary may allow reimbursement in excess of $5.50 per dry short ton on a prorated basis at such sites where the costs reimbursable under subsection (b)(1) exceed the $5.50 per dry short ton limitation described in paragraph (2) of such subsection.

(3) BYPRODUCT LOCATION.—Notwithstanding the requirement of paragraph (2)(A) that byproduct material be located at the site on the date of the enactment of this Act, byproduct material moved from the site of the Edgemont Mill to a disposal site as the result of the decontamination, decommissioning, reclamation, and other remedial action of such mill shall be eligible for reimbursement to the extent eligible under paragraph (1).

SEC. 1002. REGULATIONS. [42 U.S.C. § 2296a-1.]

Within 180 days of the date of the enactment of this Act, the Secretary shall issue regulations governing reimbursement under section 1001. An active uranium or thorium processing site owner shall apply for reimbursement hereunder by submitting a request for the amount of reimbursement, together with reasonable documentation in support thereof, to the Secretary. Any such request for reimbursement, supported by reasonable documentation, shall be approved by the Secretary and reimbursement therefor shall be made in a timely manner subject only to the limitations of section 1001.

SEC. 1003. AUTHORIZATION OF APPROPRIATIONS. [42 U.S.C. § 2296a-2.]

(a) IN GENERAL.—There is authorized to be appropriated $310,000,000 to carry out this subtitle. The aggregate amount authorized in the preceding sentence shall be increased annually as provided in section 1001, based upon an inflation index to be determined by the Secretary.

(b) SOURCE.—Funds described in subsection (a) shall be provided from the Fund established under section 1801 of the Atomic Energy Act of 1954.

* * * *

3. PERTINENT PROVISIONS OF TITLE XI (106 STAT. 2951 *ET SEQ.*)

TITLE XI—URANIUM ENRICHMENT HEALTH, SAFETY, AND ENVIRONMENT ISSUES

SEC. 1101. URANIUM ENRICHMENT HEALTH, SAFETY, AND ENVIRONMENT ISSUES.

The Atomic Energy Act of 1954 (42 U.S.C. 2011, *et seq.*), as amended by title IX of this Act, is further amended by adding at the end of title II the following:

* * * *

"CHAPTER 28—DECONTAMINATION AND DECOMMISSIONING

"SEC. 1801. URANIUM ENRICHMENT DECONTAMINATION AND DECOMMISSIONING FUND. [42 U.S.C. § 2297g.]

"(a) ESTABLISHMENT.—There is established in the Treasury of the United States an account to be known as the Uranium Enrichment Decontamination and Decommissioning Fund (referred to in this chapter as the 'Fund'). The Fund, and any amounts deposited in it, including any interest earned thereon, shall be available to the Secretary subject to appropriations for the exclusive purpose of carrying out this chapter.

"(b) ADMINISTRATION.—

"(1) IN GENERAL.—The Secretary of the Treasury shall hold the Fund and, after consultation with the Secretary, annually report to the Congress on the financial condition and operations of the Fund during the preceding fiscal year.

"(2) INVESTMENTS.—The Secretary of the Treasury shall invest amounts contained within the Fund in obligations of the United States—

"(A) having maturities determined by the Secretary of the Treasury to be appropriate for what the Department determines to be the needs of the Fund; and

"(B) bearing interest at rates determined to be appropriate by the Secretary of the Treasury, taking into consideration the current average market yield on outstanding marketable obligations of the United

States with remaining periods to maturity comparable to these obligations.

"SEC. 1802. DEPOSITS. [42 U.S.C. § 2297g-1.]

"(a) AMOUNT.—The Fund shall consist of deposits in the amount of $480,000,000 per fiscal year (to be annually adjusted for inflation using the Consumer Price Index for all-urban consumers published by the Department of Labor) as provided in this section.

"(b) SOURCE.—Deposits described in subsection (a) shall be from the following sources:

"(1) Sums collected pursuant to subsection (c).

"(2) Appropriations made pursuant to subsection (d).

"(c) SPECIAL ASSESSMENT.—The Secretary shall collect a special assessment from domestic utilities. The total amount collected for a fiscal year shall not exceed $150,000,000 (to be annually adjusted for inflation using the Consumer Price Index for all-urban consumers published by the Department of Labor). The amount collected from each utility pursuant to this subsection for a fiscal year shall be in the same ratio to the amount required under subsection (a) to be deposited for such fiscal year as the total amount of separative work units such utility has purchased from the Department of Energy for the purpose of commercial electricity generation, before the date of the enactment of this title, bears to the total amount of separative work units purchased from the Department of Energy for all purposes (including units purchased or produced for defense purposes) before the date of the enactment of this title. For purposes of this subsection—

"(1) a utility shall be considered to have purchased a separative work unit from the Department if such separative work unit was produced by the Department, but purchased by the utility from another source; and

"(2) a utility shall not be considered to have purchased a separative work unit from the Department if such separative work unit was purchased by the utility, but sold to another source.

"(d) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated to the Fund, for the period encompassing 15 years after the date of the enactment of this title, such sums as are necessary to ensure that the amount required under subsection (a) is deposited for each fiscal year.

"(e) TERMINATION OF ASSESSMENTS.—The collection of amounts under subsection (c) shall cease after the earlier of—

"(1) 15 years after the date of the enactment of this title; or

"(2) the collection of $2,250,000,000 (to be annually adjusted for inflation using the Consumer Price Index for all-urban consumers published by the Department of Labor) under such subsection.

"(f) CONTINUATION OF DEPOSITS.—Except as provided in subsection (e), deposits shall continue to be made into the Fund under subsection (d) for the period specified in such subsection.

"(g) TREATMENT OF ASSESSMENT.—Any special assessment levied under this section on domestic utilities for the decontamination and decommissioning of the Department's gaseous diffusion enrichment facilities shall be deemed a necessary and reasonable current cost of fuel and shall be fully recoverable in rates in all jurisdictions in the same manner as the utility's other fuel cost.

"SEC. 1803. DEPARTMENT FACILITIES. [42 U.S.C. § 2297g-2.]

* * * *

"(b) PAYMENT OF DECONTAMINATION AND DECOMMISSIONING COSTS.—The costs of all decontamination and decommissioning activities of the Department shall be paid from the Fund until such time as the Secretary certifies and the Congress concurs, by law, that such activities are complete.

"(c) PAYMENT OF REMEDIAL ACTION COSTS.—The annual cost of remedial action at the Department's gaseous diffusion facilities shall be paid from the Fund to the extent the amount available in the Fund is sufficient. To the extent the amount in the Fund is insufficient, the Department shall be responsible for the cost of remedial action. No provision of this title may be construed to relieve in any way the responsibility or liability of the Department for remedial action under applicable Federal and State laws and regulations.

B. CURRENT STATE OF CERTAIN PROVISIONS OF TITLES X AND XI OF EPACT

(CURRENT TO JANUARY 1, 2002)

1. TITLE X, SUBTITLE A, SECTION 1003:

SEC. 1003. AUTHORIZATION OF APPROPRIATIONS. [42 U.S.C. § 2296a-2.]

(a) IN GENERAL

There is authorized to be appropriated $490,000,000 to carry out this part. The aggregate amount authorized in the preceding sentence shall be increased annually as provided in section 2296a of this title, based upon an inflation index to be determined by the Secretary.

(b) SOURCE

Funds described in subsection (a) of this section shall be provided from the Fund established under section 2297g of this title.

2. TITLE XI, § 1101, REVISED VERSION OF SECTION 1802 OF THE ATOMIC ENERGY ACT OF 1954

SEC. 1802. DEPOSITS. [42 U.S.C. § 2297g-1.]

(a) AMOUNT

The Fund shall consist of deposits in the amount of $488,333,333 per fiscal year (to be annually adjusted for inflation using the Consumer Price Index for all-urban consumers published by the Department of Labor) as provided in this section.

(b) SOURCE

Deposits described in subsection (a) of this section shall be from the following sources:

(1) Sums collected pursuant to subsection (c) of this section.

(2) Appropriations made pursuant to subsection (d) of this section.

(c) SPECIAL ASSESSMENT

The Secretary shall collect a special assessment from domestic utilities. The total amount collected for a fiscal year shall not exceed $150,000,000 (to be annually adjusted for inflation using the Consumer Price Index for all-urban consumers published by the Department of Labor). The amount collected from each utility pursuant to this subsection for a fiscal year shall be in the same ratio to the amount required under subsection (a) of this section to be deposited for such fiscal year as the total amount of separative work units such utility has purchased from the Department of Energy for the purpose of commercial electricity generation, before October 24, 1992, bears to the total amount of separative work units purchased from the Department of Energy for all purposes (including units purchased or

produced for defense purposes) before October 24, 1992. For purposes of this subsection—

(1) a utility shall be considered to have purchased a separative work unit from the Department if such separative work unit was produced by the Department, but purchased by the utility from another source; and

(2) a utility shall not be considered to have purchased a separative work unit from the Department if such separative work unit was purchased by the utility, but sold to another source.

(d) AUTHORIZATION OF APPROPRIATIONS

There are authorized to be appropriated to the Fund, for the period encompassing 15 years after October 24, 1992, such sums as are necessary to ensure that the amount required under subsection (a) of this section is deposited for each fiscal year.

(e) TERMINATION OF ASSESSMENTS

The collection of amounts under subsection (c) of this section shall cease after the earlier of—

(1) 15 years after October 24, 1992; or

(2) the collection of $2,250,000,000 (to be annually adjusted for inflation using the Consumer Price Index for all-urban consumers published by the Department of Labor) under such subsection.

(f) CONTINUATION OF DEPOSITS

Except as provided in subsection (e) of this section, deposits shall continue to be made into the Fund under subsection (d) of this section for the period specified in such subsection.

(g) TREATMENT OF ASSESSMENT

Any special assessment levied under this section on domestic utilities for the decontamination and decommissioning of the Department's gaseous diffusion enrichment facilities shall be deemed a necessary and reasonable current cost of fuel and shall be fully recoverable in rates in all jurisdictions in the same manner as the utility's other fuel cost.

C. Relevant Provisions of USEC Privatization Act, Pub. L. No. 104-134, Title III, Subchapter A, §§ 3101 *et seq.*

(Current to January 1, 2002)

1. Title III, Subchapter A, Section 3107:

SEC. 3107. LEASING OF GASEOUS DIFFUSION FACILITIES. [42 U.S.C. § 2297h-5.]

* * * *

(d) DOE Responsibility for Preexisting Conditions

The payment of any costs of decontamination and decommissioning, response actions, or corrective actions with respect to conditions existing before July 1, 1993, at the gaseous diffusion plants shall remain the sole responsibility of the Secretary.

2. Title III, Subchapter A, Section 3109:

SEC. 3109. LIABILITIES. [42 U.S.C. § 2297h-7].

(a) Liability of the United States

(1) Except as otherwise provided in this subchapter, all liabilities arising out of the operation of the uranium enrichment enterprise before July 1, 1993, shall remain the direct liabilities of the Secretary.

(2) Except as provided in subsection (a)(3) of this section or otherwise provided in a memorandum of agreement entered into by the Corporation and the Office of Management and Budget prior to the

privatization date, all liabilities arising out of the operation of the Corporation between July 1, 1993, and the privatization date shall remain the direct liabilities of the United States.

(3) All liabilities arising out of the disposal of depleted uranium generated by the Corporation between July 1, 1993, and the privatization date shall become the direct liabilities of the Secretary.

(4) Any stated or implied consent for the United States, or any agent or officer of the United States, to be sued by any person for any legal, equitable, or other relief with respect to any claim arising from any action taken by any agent or officer of the United States in connection with the privatization of the Corporation is hereby withdrawn.

(5) To the extent that any claim against the United States under this section is of the type otherwise required by Federal statute or regulation to be presented to a Federal agency or official for adjudication or review, such claim shall be presented to the Department of Energy in accordance with procedures to be established by the Secretary. Nothing in this paragraph shall be construed to impose on the Department of Energy liability to pay any claim presented pursuant to this paragraph.

(6) The Attorney General shall represent the United States in any action seeking to impose liability under this subsection.

(b) LIABILITY OF THE CORPORATION

Notwithstanding any provision of any agreement to which the Corporation is a party, the Corporation shall not be considered in breach, default, or violation of any agreement because of the transfer of such agreement to the private

corporation under section 3108 or any other action the Corporation is required to take under this subchapter.

(c) LIABILITY OF THE PRIVATE CORPORATION

Except as provided in this subchapter, the private corporation shall be liable for any liabilities arising out of its operations after the privatization date.

(d) LIABILITY OF OFFICERS AND DIRECTORS

(1) No officer, director, employee, or agent of the Corporation shall be liable in any civil proceeding to any party in connection with any action taken in connection with the privatization if, with respect to the subject matter of the action, suit, or proceeding, such person was acting within the scope of his employment.

(2) This subsection shall not apply to claims arising under the Securities Act of 1933 (15 U.S.C. 77a. et seq.), the Securities Exchange Act of 1934 (15 U.S.C. 78a, et seq.), or under the Constitution or laws of any State, territory, or possession of the United States relating to transactions in securities.

Supreme Court, U.S.
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Nos. 01-1020, 01-1155, 01-1398 and 01-1411

In the Supreme Court of the United States

SACRAMENTO MUNICIPAL UTILITY DISTRICT, PETITIONER

v.

UNITED STATES OF AMERICA

MAINE YANKEE ATOMIC POWER COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

OMAHA PUBLIC POWER DISTRICT, PETITIONER

v.

UNITED STATES OF AMERICA

COMMONWEALTH EDISON COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

In order to provide some of the funds necessary to decontaminate the Department of Energy's uranium enrichment facilities, Congress imposed a special assessment on those domestic nuclear utilities that had purchased, either from the Department of Energy directly or in the secondary market, uranium that had been enriched at those facilities. See 42 U.S.C. 2297; 42 U.S.C. 2297g-1 (1994 & Supp. V 1999). The questions presented are:

1. Whether the special statutory decontamination assessment constitutes an unlawful breach of the contracts for uranium enrichment services between petitioners and the Department of Energy.

2. Whether the special decontamination assessment constitutes an impermissible taking of petitioners' property without just compensation.

3. Whether the special decontamination assessment is unconstitutionally retroactive, in violation of petitioners' substantive due process rights.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The decision of the en banc court of appeals in *Commonwealth Edison* (SMUD Pet. App. 17a-68a; Com Ed Pet.

App. 1a-52a)[1] is reported at 271 F.3d 1327. The decision of the Court of Federal Claims in *Commonwealth Edison* (Com Ed Pet. App. 85a-120a) is reported at 46 Fed. Cl. 29.

The consolidated decision of the panel of the court of appeals in *Sacramento Municipal*, *Maine Yankee*, and *Omaha Power* (SMUD Pet. App. 1a-16a) is reported at 271 F.3d 1357. The decision of the Court of Federal Claims in *Sacramento Municipal* (SMUD Pet. App. 69a-91a) is reported at 44 Fed. Cl. 395. The decision of the Court of Federal Claims in *Maine Yankee* (MYAP Pet. App. 17a-39a) is reported at 44 Fed. Cl. 372. The decision of the Court of Federal Claims in *Omaha Power* (OPPD Pet. App. 17a-39a) is reported at 44 Fed. Cl. 383.

JURISDICTION

The judgment of the en banc court of appeals in *Commonwealth Edison* was entered on November 20, 2001. On February 12, 2002, the Chief Justice extended the time within which to file a petition for a writ of certiorari in that case to and including March 20, 2002, and the petition was filed on that date.

The judgment of the panel of the court of appeals in *Sacramento Municipal*, *Maine Yankee*, and *Omaha Power* was entered on November 20, 2001. Sacramento Municipal Utility District's petition for a writ of certiorari in No. 01-1020 was filed on January 10, 2002. Maine Yankee Atomic Power Company's petition in No. 01-1155 was filed on February 8, 2002. On February 13, 2002, the Chief Justice extended the time for filing a certiorari petition for Omaha Public Power District to and including March 20, 2002, and the petition in No. 01-1398 was filed on that date.

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[1] References in this brief to "SMUD Pet." are to the petition in No. 01-1020; to "MYAP Pet." are to the petition in No. 01-1155; to "OPPD Pet." are to the petition in No. 01-1398; and to "Com Ed Pet." are to the petition in No. 01-1411.

The jurisdiction of this Court in each case is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1992, Congress enacted the Energy Policy Act (EPACT), Pub. L. No. 102-486, 106 Stat. 2276, which was intended to establish a "comprehensive national energy policy" addressing, among other things, "solutions to our nuclear waste and uranium enrichment problems." H.R. Rep. No. 474, 102d Cong., 2d Sess. Pt. 1, at 132 (1992). Among those problems was contamination at the Department of Energy's (DOE's) uranium enrichment facilities. The government had conducted uranium enrichment at those facilities since the 1940s, and since the 1960s had offered commercial uranium enrichment services to utility companies for use in power generation. See SMUD Pet. App. 20a.[2]

Typically, DOE offered uranium enrichment to utilities under an arrangement by which the purchasers furnished low-grade uranium to the Department, DOE processed the uranium, and DOE then returned the enriched uranium to the utilities. The enrichment services were measured in terms of "separative work units" (SWUs). Utilities were typically charged the product of the number of SWUs they received, multiplied by the unit price in the contract. The unit pricing varied somewhat from contract to contract, but generally the unit price was established by reference to the price in effect at the time the service was rendered, and in some cases was also capped by contract at a maximum price. SMUD Pet. App. 20a-21a.

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[2] Before the establishment of the Department of Energy, the government's uranium enrichment facilities were operated by the Atomic Energy Commission and by the Energy Research and Development Administration. See SMUD Pet. App. 20a. For simplicity, we refer in this brief to the governmental entity that conducted uranium enrichment as DOE or the Department.

Before enacting EPACT, Congress extensively considered numerous options to finance the decontamination and decommissioning of uranium enrichment facilities. Congress considered past use of the plants, the causes of the contamination, and estimates of clean-up costs. By 1992, estimates of the cost of decontamination had risen to more than $20 billion. During hearings, industry representatives, who participated actively in the framing of EPACT, acknowledged that the industry had benefited from the uranium enrichment services, and expressed the industry's willingness to pay a fair share of the cost of decontaminating the enrichment facilities. They urged Congress to adopt a compromise that capped utilities' contribution at $2.5 billion. See *Comprehensive National Energy Policy Act: Hearings on H.R. 776 Before the House Comm. on Ways and Means*, 102d Cong., 2d Sess. 171, 178-182 (1992); SMUD Pet. App. 26a-30a (reviewing legislative framing of EPACT).

After debating options and weighing facts surrounding the use and contamination of the plants, Congress concluded that it was equitable for domestic utilities that had benefited from DOE's uranium enrichment services to contribute a portion of the cost of decontaminating the facilities where that enrichment was conducted. See H.R. Rep. No. 474, *supra*, Pt. 8, at 77-78; 138 Cong. Rec. 32,073 (1992) (remarks of Rep. Sharp). Congress established the Uranium Enrichment Decontamination and Decommissioning Fund (Fund) to accumulate and disburse the funds necessary to decontaminate those facilities. See 42 U.S.C. 2297g; 42 U.S.C. 2297g-1 (1994 & Supp. V 1999). Congress provided that the federal government would absorb the majority of the decontamination costs through annual appropriations to the Fund totaling $330 million (adjusted annually for inflation), or 68% of the total amount to be deposited into the Fund over 15 years. See 42 U.S.C. 2297g-1(b)(2), (c) and (d); 42 U.S.C. 2297g-1(a) (1994 & Supp. V 1999).

The remaining 32% (not to exceed $2.25 billion over 15 years) of the Fund's financial base is collected in annual installments (not to exceed $150 million per year, adjusted annually for inflation) from domestic utilities that obtained government-enriched uranium for the purpose of generating electricity. See 42 U.S.C. 2297g-1(c). Whether a utility is required to contribute to the Fund turns not on whether the utility had entered into a contract to purchase uranium from DOE, but whether the utility actually obtained the enriched uranium, and thus had benefited from DOE's enrichment services. In particular, a utility that purchased enriched uranium from DOE but resold that uranium to another utility on the secondary market is not responsible to contribute to the Fund for the amount of uranium that it resold and did not use, whereas a utility that purchased uranium from another utility but not from DOE for its own use in power generation is responsible for contributing to the Fund in an amount proportionate to the amount of uranium that it used. See 42 U.S.C. 2297g-1(c); see also SMUD Pet. App. 25a. Utilities that are required to pay an assessment to the Fund may in turn treat that assessment as a "necessary and reasonable current cost of fuel" that is "fully recoverable in rates * * * in the same manner as the utility's other fuel cost." 42 U.S.C. 2297g-1(g).

2. After the enactment of EPACT, petitioners, as well as several other utility companies, each filed suit in the Court of Federal Claims challenging the EPACT assessments on constitutional and contract-law grounds. In 1997, a panel of the Federal Circuit, in a separate case, rejected the utilities' principal arguments based on contract law. *Yankee Atomic Elec. Co.* v. *United States*, 112 F.3d 1569 (Fed. Cir. 1997), cert. denied, 524 U.S. 951 (1998). The *Yankee Atomic* panel first noted that the disputes did not even "appear to be [cases] involving a breach of contract[,]" because, "[t]ypically, a contract breach occurs while the contract is

being performed, whereas the contracts in the present case have been fully performed by both parties." *Id.* at 1573 n.2. The court also concluded, however, that the government was not liable for breach of contract in any event based on EPACT because of the sovereign-acts and unmistakability doctrines. *Id.* at 1574. In so concluding, the court carefully examined and applied this Court's decision in *United States* v. *Winstar Corp.*, 518 U.S. 839 (1996).

Applying the sovereign-acts doctrine, the *Yankee Atomic* court ruled that passage of the EPACT assessment provision did not constitute a breach of the government's contract with the utilities because that provision was enacted not "for the purpose of retroactively increasing the price of its earlier contracts with [the utilities]," but rather "for the purpose of solving the problem of decontamination and decommissioning of uranium enrichment facilities (*i.e.*, the legislation was passed for the benefit of the public)." 112 F.3d at 1575. The court stressed that the EPACT assessments fall not on the entities that contracted with DOE for enrichment services, but rather on the utilities that eventually used the enriched uranium for power generation, even if they purchased that uranium in the secondary market. *Id.* at 1574-1575.

The *Yankee Atomic* court further concluded that, under the unmistakability doctrine (under which "[a] contract with a sovereign government will not be read to include an unstated term exempting the other contracting party from the application of a subsequent sovereign act," EPACT also furnished no basis for government liability to the utilities. See 112 F.3d at 1578 (quoting *Winstar*, 518 U.S. at 878 (opinion of Souter, J.)). The court noted that "application of the unmistakability doctrine turns on whether enforcement of the contractual obligation would effectively block the exercise of a sovereign power of the Government," and that the utilities' contracts with the government, although typi-

cally fixed-price contracts, contained no promise that "unmistakably precluded the Government from subsequently exercising its sovereign power to assess a tax." *Id.* at 1579.[3] The utility sought certiorari in *Yankee Atomic*, arguing that EPACT breached its contract with DOE, but this Court denied review, 524 U.S. 951 (1998).

3. Thereafter, these cases proceeded in the Court of Federal Claims. Each case was dismissed by that court for failure to state a claim. See SMUD Pet. App. 69a-91a; MYAP Pet. App. 17a-39a; OPPD Pet. App. 17a-39a; Com Ed Pet. App. 85a-124a.

Each petitioner appealed to the Federal Circuit. Oral arguments in *Sacramento Municipal*, *Maine Yankee*, and *Omaha Power* were separately conducted on the same day before the same panel of the Federal Circuit. The separate and later appeal in *Commonwealth Edison* proceeded before a different panel of the Federal Circuit; after that panel argument, the Federal Circuit *sua sponte* ordered that *Commonwealth Edison* be heard en banc. SMUD Pet. App. 17a.

4. The en banc court affirmed the dismissal in *Commonwealth Edison*. SMUD Pet. App. 17a-68a. On the basis of the en banc court's decision in *Commonwealth Edison*, the panel hearing the appeals in the other three cases also affirmed the dismissal of those cases. *Id.* at 1a-16a.

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[3] Judge Mayer dissented from the panel's decision in *Yankee Atomic*, but he would not have ruled that EPACT constituted a breach of contract. To the contrary, he agreed with the panel majority that "[o]nce a contract is completed, the contractual relationship ends and there is no privity between the parties," and thus the utilities "cannot prevail on [the] claim that the government breached the contracts at issue years after they were finished." 112 F.3d at 1582; see also *id.* at 1584 ("But this is not a breach of contract case."). Rather, Judge Mayer argued that the EPACT assessments contravened substantive due process. See *id.* at 1585.

a. The en banc court first rejected the utilities' argument that the EPACT assessments constitute a taking of their property without just compensation. The court noted that, in *Eastern Enterprises* v. *Apfel*, 524 U.S. 498 (1998), five Justices (Justice Kennedy concurring in the judgment, and four dissenting Justices) concluded that "regulatory actions requiring the payment of money are not takings" (SMUD Pet. App. 36a)—a result in accord with the Federal Circuit's own pre-*Eastern Enterprises* precedent (*id.* at 36a-37a) as well as decisions of other circuits rendered after *Eastern Enterprises* (*id.* at 36a n.10). The court thus concluded that, "while a taking may occur when a specific fund of money is involved, the mere imposition of an obligation to pay money, as here, does not give rise to a claim under the Takings Clause of the Fifth Amendment." *Id.* at 37a.

b. The court also rejected the utilities' breach of contract claims, in reliance on its previous decision in *Yankee Atomic*, *supra*. As in *Yankee Atomic*, the court ruled here that "the imposition of the special assessments [under EPACT] was a lawful exercise of Congress's taxing power under the sovereign acts doctrine," and that DOE's contracts with the utilities "did not include an unmistakable promise that precluded the Government from later imposing an assessment upon all domestic utilities that employed the DOE's uranium enrichment services." SMUD Pet. App. 38a.

c. Finally, the court addressed at length and rejected the argument that the EPACT assessments violate substantive due process. SMUD Pet. App. 39a-67a. The court initially observed that, although the EPACT assessments are retroactive, that point by itself does not render them unconstitutional, for, as this Court has made clear, due process is satisfied "simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose." *Id.* at 40a (citation omitted). The court found that standard satisfied in the case of EPACT, because the

assessments are based on "a congressional determination to impose liability on companies that received a benefit [the uranium enrichment services], the production of which benefit contributed to a societal problem." *Id.* at 43a.

Summarizing this Court's decisions (including *Eastern Enterprises*), the court concluded that retroactive obligations to pay money satisfy substantive due process as long as "(1) Congress reasonably concluded that the party subjected to retroactive obligations benefited from activity that contributed to a societal problem, and liability is not disproportionately imposed on that party; and (2) the imposition of retroactive liability would not be contrary to that party's reasonable expectations." SMUD Pet. App. 47a. The court found the first condition "easily" satisfied, as the utilities "certainly benefited from the government's provision of enrichment services." *Ibid.* As the court noted, the utilities "could hardly have operated nuclear reactors without the benefit of uranium enrichment services from the United States government or some other approved source." *Id.* at 48a. Moreover, the processing of uranium for the utilities contributed to a societal problem by contributing "to increased costs associated with" decontamination. *Ibid.* Nor, the court ruled, were the remediation costs imposed on the utilities severely disproportionate to the benefit they received from the enrichment services; EPACT made the utilities responsible for only a third of those costs (and each utility was assessed only for the proportion of enriched uranium that it actually used), even though Congress received evidence that enriched uranium production at the DOE facilities had been divided equally between the governmental and commercial sectors. *Id.* at 49a.

The court further concluded that the EPACT assessments do not violate any reasonable expectation on the part of the utilities that, as a result of their contracts with DOE, they were entitled to immunity from any future liability for the

cost of decontamination of the DOE facilities. SMUD Pet. App. 50a-67a. The court observed that the utilities operated in a highly regulated industry where it was reasonable to "expect liability for remediation costs" (*id.* at 52a), and that the utilities were fully "aware of the hazardous nature of the materials" and that there would be a need to decontaminate the DOE facilities (*id.* at 53a).

The court also stressed that the regulatory environment at the time that utilities submitted uranium to DOE for processing placed the utilities on notice of the possible imposition of retroactive remediation liability. The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.*, made clear that a party that arranges for the treatment or disposal of a hazardous substance may be liable for environmental damage caused by that substance, even if that party itself did not perform that treatment or disposal. See SMUD Pet. App. 56a-57a. CERCLA, in turn, is consistent with principles of common law nuisance liability and strict liability for handling of ultrahazardous materials, *id.* at 60a-62a, especially the principles set forth in the Restatement (Second) of Torts § 472b (1965), which made clear that "those arranging for processing of hazardous materials could potentially have been liable under the common law for environmental damages arising from the processing." SMUD Pet. App. 61a. Thus, the court concluded, the utilities "could not have reasonably expected that Congress would not enact legislation imposing remediation costs on the utilities submitting uranium for processing." *Id.* at 62a.

ARGUMENT

The court of appeals correctly rejected petitioners' contract-law and constitutional challenges to the special decontamination assessments imposed by EPACT. That decision also does not conflict with any decision of this Court

or any other court of appeals. Further review is therefore not warranted.

1. Petitioners renew the argument rejected by the Federal Circuit in *Yankee Atomic*, *supra*, that the EPACT assessments breached their uranium enrichment contracts with DOE by retroactively increasing the price of enrichment services. This Court denied review of the same contention in *Yankee Atomic*, see pp. 5-7, *supra*, and there is no basis in this case for a different result. Moreover, the lower courts properly rejected that contract claim.

a. First, as all members of the *Yankee Atomic* panel observed, no claim for breach of contract may be brought based on contracts that have already been fully performed. See 112 F.3d at 1573 n.2; *id.* at 1582 (Mayer, J., dissenting); see also *John J. Kirlin, Inc.* v. *United States*, 827 F.2d 1538, 1541 (Fed. Cir. 1987); *Mulholland* v. *United States*, 361 F.2d 237, 239-240 (Ct. Cl. 1966). Petitioners' complaints allege that, with the exception of one outstanding contract between DOE and Commonwealth Edison, the contractual relation between petitioners and the government had already terminated.[4]

Because (with the one exception) the contractual relations between the utilities and the government terminated before these actions were brought, this case does not present an appropriate occasion for the Court to examine further the sovereign-acts and unmistakability doctrines. The bulk of petitioners' contract claims could have been rejected without recourse to those doctrines, which are defenses available to the government against attempts to require the government to perform its contractual obligations, or to recover for the government's alleged breach of contractual obligations. See

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[4] See SMUD C.A. App. 24 (¶ 1); MYAP C.A. App. 35 (¶ 47), 36 (¶¶ 50-51); OPPD C.A. App. 16 (¶ 44); Com Ed C.A. App. 521 (¶ 13), 534 (¶ 45), 535 (¶ 49).

Winstar, 518 U.S. at 870-871 (opinion of Souter, J.); *id.* at 920-921 (Scalia, J., concurring in the judgment).

For the same reason, there is no merit to petitioner Omaha Power's argument (OPPD Pet. 21-22) that the decision below conflicts with the courts' application of the sovereign-acts doctrine in *Kimberly Associates* v. *United States*, 261 F.3d 864 (9th Cir. 2001), and *RTC* v. *FSLIC*, 25 F.3d 1493 (10th Cir. 1994). In each of those decisions, the court made clear that the sovereign-acts doctrine "operates to insulate the government from liability for certain inabilities to perform contractual obligations." See *RTC*, 25 F.3d at 1501; see also *Kimberly Assocs.*, 261 F.3d at 870 (characterizing statute under consideration as "a partial repudiation by Congress of its contractual obligation to perform"). Here, however, there is no question of the government's failure to perform under its contracts with petitioners; DOE has already performed its obligations to provide enrichment services.

b. In any event, the court of appeals' application of the sovereign-acts and unmistakability doctrines was correct. The EPACT special assessment legislation is a "sovereign act." The assessments fall on the utilities that actually used the enriched uranium and thereby benefited from DOE's enrichment services, not the entities that directly purchased the uranium from DOE. Thus, EPACT cannot be viewed as a retroactive price increase of the contracts between DOE and the purchasing utilities. Rather, it is legislation designed to spread the costs of decontamination and decommissioning among the utilities that benefited from the program that caused those problems. See SMUD Pet. App. 61a; *Yankee Atomic*, 112 F.3d at 1580-1581.

Furthermore, because petitioners seek damages in the entire amount of the assessments that they are required to pay under EPACT, they effectively seek an exemption from, or an injunction against, the operation of EPACT as applied

to them. Petitioners must therefore overcome the unmistakability doctrine in its strongest form. See *Winstar*, 518 U.S. at 881-882 (opinion of Souter, J.); *id.* at 916-917 (Breyer, J., concurring); *id.* at 921 (Scalia, J., concurring in the judgment). As the Federal Circuit explained in *Yankee Atomic*, the contracts simply did not provide that the government would forego any assessments in the future on the nuclear power industry to address the cost of decontamination. See 112 F.3d at 1569. The contracts were therefore subject to subsequent legislation passed by Congress. See *Bowen* v. *Public Agencies Opposed to Soc. Sec. Entrapment*, 477 U.S. 41, 52 (1986).

Nor did the government agree to indemnify the utilities against the costs of regulatory changes or legislative enactments. In *Winstar*, by contrast, this Court ruled that the United States, through guarantee clauses in contracts, had undertaken to assume the risk of, and to indemnify the acquiring thrifts for, future changes in regulatory policy. See 518 U.S. at 868-869, 871, 881-883 (opinion of Souter, J.); *id.* at 911, 918 (Breyer, J., concurring); cf. *id.* at 919-920, 923 (Scalia, J., concurring in the judgment). No such guarantee clauses existed in petitioners' contracts with DOE.

2. a. Petitioners argue that the financial impact of the EPACT assessments on them constitutes a taking of their property without just compensation. Petitioners' taking claim, however, must fail at threshold, for as five Justices of this Court made clear in *Eastern Enterprises*, a mere obligation to pay an undifferentiated amount of money, not drawn from a specific identifiable fund, is not properly analyzed as a taking at all. See *Eastern Enterprises*, 524 U.S. at 539-547 (Kennedy, J., concurring in the judgment and dissenting in part); *id.* at 554-557 (Breyer, J., dissenting). That point follows from the fact that, "[a]s its language indicates, * * * [the Just Compensation Clause] does not prohibit the taking of private property, but instead places a

condition on the exercise of that power." *First English Evangelical Lutheran Church* v. *County of Los Angeles*, 482 U.S. 304, 314 (1987).[5]

The concern of the Just Compensation Clause is therefore not in *preventing* government action, but rather ensuring that compensation is paid when the government appropriates private property interests to serve the public good. *First English*, 482 U.S. at 314. Petitioners, however, challenge the constitutional validity of Congress's decision to enact the EPACT special assessments. To make a taking claim, petitioners would have to raise the highly contrived contention that Congress had impermissibly failed to offer them monetary compensation in the precise amount of the special assessment that Congress had ordered them to pay. The Court rejected a very similar contention in *United States* v. *Sperry Corp.*, 493 U.S. 52 (1989), where it concluded that the government's imposition of a service fee for use of services in the U.S.-Iran Claims Tribunal, in the form of a percentage deduction from monetary awards made by the

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[5] The taking issue in this case is not distinguishable from *Eastern Enterprises* (in which five Justices found a taking analysis inapplicable) on the basis that *Eastern Enterprises* involved an obligation that one private party pay money to another private party, whereas this case involves an obligation to pay money to the government. Justice Kennedy expressly rejected the relevance of that point in *Eastern Enterprises*: "The circumstance that the statute does not take money for the Government but instead makes it payable to third persons is not a factor I rely upon to show the lack of a taking." 524 U.S. at 543 (Kennedy, J., concurring in the judgment and dissenting in part). The four other Justices who agreed that no valid taking claim was raised in *Eastern Enterprises* did remark that the case involved an obligation to pay money to a private party. See *id.* at 555 (Breyer, J., dissenting). They also observed, however, that one of the reasons that it was wrong to conceptualize the monetary obligation in *Eastern Enterprises* as a taking was that such a characterization might well lead to the conclusion that all taxes could potentially be considered takings. See *id.* at 556 (Breyer, J., dissenting).

Tribunal, was not a taking of property that required just compensation. As the Court explained:

> It is artificial to view deductions of a percentage of a monetary award as physical appropriations of property. Unlike real or personal property, money is fungible. * * * If the deduction in this case were a physical occupation requiring just compensation, so would be any fee for services, including a filing fee that must be paid in advance.

Id. at 62 n.9. The Court in *Sperry* also distinguished (*id.* at 62) cases such as *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 164-165 (1980), where the Court applied a taking analysis to interest generated from a specific *res*, a separately identifiable fund of money.[6]

Perhaps recognizing the force of that point, petitioner Commonwealth Edison stretches to find a specific property interest that may have been taken, suggesting (Com Ed Pet. 13) that the requisite "property" is the "stream of income" supposedly created by the passing on of the cost of the assessments to consumers of electrical power. EPACT, however, does not require the payment of the assessments out of any such "stream of income" or indeed from any particular identifiable source or fund of money. Rather, the utilities are generally liable for EPACT assessments without regard to whether the assessments are passed on to

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[6] Petitioner MYAP argues (MYAP Pet. 21) that cases such as *Webb's* are not distinguishable from this case because *Webb's* involved a taking of interest earned on a specific fund of money, not the fund itself. The Court made clear in *Webb's*, however, that it decided that case based on the common law rule that "any interest * * * follows the principal" and becomes part of the fund itself. See *Webb's*, 449 U.S. at 162; see also *Phillips* v. *Washington Legal Found.*, 524 U.S. 156, 165-168 (1998) (using same rule to analyze alleged taking of interest earned on attorney trust accounts).

consumers and without reference to the source of the funds used to pay the assessments. See *Sperry*, 493 U.S. at 62 n.9.

b. Even if a taking analysis were applicable to the EPACT assessments, they would not be invalid. A taking by regulation or legislation may occur if the government goes "too far" in interfering with rights of property ownership. *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415 (1922). Regulatory taking claims are generally subject to the three-part analysis set forth in *Penn Central Transportation Co.* v. *City of New York*, 438 U.S. 104, 124 (1978), which takes into account (1) "the character of the governmental action," (2) "[t]he economic impact of the regulation on the claimant," and (3) "the extent to which the regulation has interfered with distinct investment-backed expectations." Those factors make clear that the EPACT assessments are not takings.[7]

First, the nature of the government's action is "critical" in determining whether a taking occurred. *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 488 (1987). EPACT assessments are "very similar to * * * a general tax that falls proportionately on all utilities that benefited from the DOE's uranium enrichment services." *Yankee Atomic*, 112 F.3d at 1576. This Court has stressed, however, that taxes are exactly the kind of governmental action that

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[7] The EPACT assessments cannot properly be viewed as a physical appropriation or occupation of property that this Court has characterized as a per se taking. Cf. *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982). Even the four Justices who applied a taking analysis to the legislatively imposed monetary obligation at issue in *Eastern Enterprises* declined to characterize that liability as a per se taking. See *Eastern Enterprises*, 524 U.S. at 522, 530 (opinion of O'Connor, J.); see also *Tahoe-Sierra Preservation Council, Inc.* v. *Tahoe Reg'l Planning Agency*, No. 00-1167 (Apr. 23, 2002), slip op. 17-28 (reaffirming limited reach of per se taking analysis to physical occupations and appropriations of property).

are least likely to be considered takings: "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law, and this Court has accordingly recognized, in a wide variety of contexts, that government may execute laws or programs that adversely affect recognized economic values. *Exercises of the taxing power are one obvious example.*" *Penn Central*, 438 U.S. at 124 (emphasis added; citations omitted).

Second, the economic impact of the assessments on petitioners is proportionate to their prior experience with the uranium enrichment services that are the object of the legislation. EPACT specifically allocates liability in direct proportion to the utilities' previous use of enriched uranium. See p. 5, *supra*. In addition, EPACT moderates the impact of the assessments on petitioners by mandating that a utility "shall" be allowed to fully recover the special assessments from its ratepayers as a "necessary and reasonable current cost of fuel." 42 U.S.C. 2297g-1(g). Because the pass-through mechanism is established by federal law, state regulators are preempted from disregarding it. See, *e.g.*, *Mississippi Power & Light Co.* v. *Mississippi*, 487 U.S. 354, 369-372 (1988). Thus, petitioners have a federal right to pass through the impact of the EPACT assessments to their customer base. Cf. *Eastern Enterprises*, 524 U.S. at 527, 531 (opinion of O'Connor, J.) (noting that regulated entity's ability to moderate impact of liability by passing on obligation is relevant to taking analysis, but finding no "right of reimbursement" in that case).

Finally, the assessments do not contravene any reasonable expectation on the part of petitioners that they would be immune from future governmental assessments requiring contributions to meet the costs of decontamination of the enrichment facilities. As the court of appeals explained, enriched uranium has long been known to be extremely

hazardous; it has long been understood that the enrichment process would leave a need for decontamination; and the nuclear power industry has always been strictly regulated. See SMUD Pet. App. 52a-54a. EPACT was designed "to implement solutions to our nuclear waste and uranium enrichment problems," H.R. Rep. No. 474, *supra*, Pt. 1, at 132, and a nuclear utility using enriched uranium could hardly expect to be immune from contributing to such solutions. "Those who do business in [a highly regulated field] cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end." *Connolly* v. *Pension Benefit Guar. Corp.*, 475 U.S. 211, 227 (1986).

Nothing in the legislation or regulations governing the nuclear power program could have created a reasonable expectation that nuclear power companies would be exempt from future assessments for decontamination of uranium enrichment plants. To the contrary, the strict regulation of the industry put them on notice that they could be liable in the future for assessments like those at issue here. And as the court of appeals also explained in *Yankee Atomic*, 112 F.3d at 1580-1581, petitioners' contracts with DOE for uranium enrichment services also created no contract-based expectation that they would be immune from sharing in the future cost of decontamination.

c. Petitioners erroneously suggest (Com Ed Pet. 16) that the decision below, finding a taking analysis inapplicable, is contrary to decisions of other circuits that have analyzed monetary obligations to the government under the regulatory taking doctrine. In *United States* v. *Hercules, Inc.*, 247 F.3d 706 (8th Cir.), cert. denied, 122 S. Ct. 665 (2001), the court expressly *declined* to address the taking claim on the ground that the extent of the challenged monetary liability was uncertain. Although the court remarked that any taking analysis would likely be "ad hoc and fact intensive," *id.* at 722

(citing *Eastern Enterprises*, 524 U.S. at 523 (opinion of O'Connor, J.)), it did not address the logically anterior question whether the liability should be analyzed as a taking at all. In *United States Fidelity & Guaranty Co.* v. *McKeithen*, 226 F.3d 412 (5th Cir. 2000), cert. denied, 532 U.S. 922 (2001), the court ruled that a retroactive adjustment to Louisiana's workers' compensation scheme was an invalid taking, but the court stressed (after considering the significance of Justice Kennedy's separate opinion in *Eastern Enterprises*) that the case before it involved the taking of "an identifiable property interest or fund," namely, a "specific fund of benefits." *Id.* at 420. That important point distinguishes that case from this one, which involves a general liability that petitioners may and must meet out of any of their assets.[8]

3. Petitioners contend that the EPACT assessment obligation violates substantive due process because of its retroactive effect. Petitioners make essentially three arguments in support of that contention. First, they argue that they had a reasonable expectation, based in their fixed-price contracts with DOE, that the costs of decontaminating the enrichment facilities would be entirely absorbed by the government. Second, they contend that the extent of the retroactivity, by itself, renders the assessments invalid. Third, they argue that they cannot be deemed responsible for the contamination because the facilities were already contaminated by the government's enrichment of uranium

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[8] In addition, the Louisiana scheme invalidated in *United States Fidelity & Guaranty* is crucially different from the EPACT assessments in that many of the workers' compensation insurance companies affected by the retroactive change in the law effectively had no way to pass on the increased assessments to any customer base in the State, for they had left the business of writing insurance in Louisiana. See 226 F.3d at 418. By contrast, petitioners have a federal right to pass on the EPACT assessments to their utility customers. See p. 17, *supra*.

for its own military needs before the government began offering commercial enrichment services to nuclear utilities. Each of those arguments is without merit.[9]

a. As this Court has made clear on numerous occasions, retroactive economic legislation enjoys a presumption of validity. See, *e.g.*, *Pension Benefit Guar. Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717, 729 (1984); *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15-16 (1976). That presumption of validity is not overcome merely because the law upsets "otherwise settled expectations" or imposes new liability based on past acts. *Id.* at 16. Of course, "[i]t does not follow * * * that what Congress can legislate prospectively it can legislate retrospectively," and "[t]he retro[active] aspects of legislation * * * [also] must meet the test of due process." *Id.* at 16-17. But "[p]rovided that the retroactive application of a statute is supported by a legitimate legislative purpose

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[9] Petitioners also argue (SMUD Pet. 23-24; MYAP Pet. 17-19) that the EPACT assessments require special scrutiny under the Due Process Clause because (petitioners maintain) they operate as taxing provisions. But as this Court explained in *United States* v. *Carlton*, 512 U.S. 26 (1994), and as the court of appeals in this case observed (SMUD Pet. App. 41a), the cases on which petitioners rely, subjecting retroactive taxes to heightened scrutiny, "were decided during an era characterized by exacting review of economic legislation under an approach that has long since been discarded." *Carlton*, 512 U.S. at 34 (internal quotation marks omitted). *Carlton* made clear that the rational-basis due process test for retroactive application of taxing statutes "is the same as that generally applicable to retroactive economic legislation." *Id.* at 30. Moreover, the tax cases on which petitioners rely all involved taxes for the purposes of raising *general* revenues for the support of government. This case involves an assessment for a dedicated purpose, namely, the decontamination and decommissioning of enrichment facilities from which petitioners benefited. Thus, even if, as petitioners contend, a "wholly new tax" for the purpose of raising general revenues could not be applied retroactively, see MYAP Pet. 18, that point would not apply to an assessment, such as the EPACT assessment, that is intended and necessary to implement a specific regulatory scheme.

furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches." *R.A. Gray*, 467 U.S. at 729.

It was legitimate and rational for Congress to require utilities that obtained their enriched uranium from government-operated facilities to contribute to the cost of decontaminating those facilities. The substantial cost of decontamination was not anticipated at the time the government provided those enrichment services, and Congress was not precluded from acting to spread the "actual, measurable cost of [a] business" that the utilities were able to avoid in the past. *Turner Elkhorn*, 428 U.S. at 19. "[T]he costs of large, unrecognized societal problems are frequently spread among those who benefited from the source of the problem," *Yankee Atomic*, 112 F.3d at 1576 n.6, and the EPACT assessment is "the Government's way of spreading the costs of the later discovered decontamination and decommissioning problem on all utilities that benefited from the Government's service, whether or not those services were acquired by contract from the Government," *id.* at 1580.

Moreover, Congress understood that the utilities had received two substantial benefits (beyond just receiving the uranium itself) from the government's enrichment services. First, DOE was required to price the enrichment services on a cost-recovery basis; the program was not intended as a profit-making enterprise. See 42 U.S.C. 2201(v)(B)(iii) (1988). Thus, the utilities received below-market pricing for the services. Second, by obtaining the use of the government's enrichment facilities, utilities were able to avoid the even greater costs of building enrichment plants of their own and meeting their own decontamination costs. See 138 Cong. Rec. at 32,073 (remarks of Rep. Sharp); H.R. Rep. No. 474, *supra*, Pt. 1, at 144-145.

Petitioners in any event did not have a reasonable expectation that they would be immune from legislation requiring them to contribute to the cost of decontaminating the facilities from which they obtained their enriched uranium. Petitioners' contracts with DOE set a price for uranium enrichment services, but the contracts did not address future assessments for decontamination and decommissioning at all—much less purport to foreclose any future liability that might prove to be necessary to protect the public health and safety. There accordingly was no settled expectation to upset. See *Yankee Atomic*, 112 F.3d at 1575-1582; cf. *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1005-1006, 1008-1010 (1984).

Nor did the legislative and regulatory environment at the time the enrichment services were provided suggest that petitioners could escape liability for decontamination costs. To the contrary, as the court of appeals explained, based on its comprehensive review of the law of liability for hazardous substances (SMUD Pet. App. 54a-67a), it was entirely foreseeable, well before the enactment of EPACT, that the utilities would have to contribute to the decontamination of the enrichment facilities. First, CERCLA, which was enacted in 1980, and which itself operates retroactively as well as prospectively, contains a principle that one who arranges for the treatment or disposal of a hazardous substance may be liable for remediation costs, even if that party did not conduct the processing or disposal itself. See *id.* at 56a-57a.[10]

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[10] Petitioner Commonwealth Edison argues (Com Ed Pet. 21-22) that CERCLA would not support arranger liability for one in its position. It argues, for example (*id.* at 21), that only one who maintains ownership or control over the hazardous substance may be subject to arranger liability. But the arranger liability cases cited by the court of appeals (SMUD Pet. App. 56a-57a) do not turn on which party maintained technical title to the processed and disposed materials, and such an inquiry would make especially little sense in a situation like this one, where many of the customers

Second, even before CERCLA, principles of common law liability, as summarized in the Restatement (Second) of Torts § 427b (1965), made clear that "those arranging for processing of hazardous materials could potentially have been liable under the common law for environmental damages arising from the processing." See SMUD Pet. App. 61a.

b. Petitioners lay great stress on the fact that EPACT has a retroactive reach of up to 33 years, as the government began offering commercial enrichment services in 1969. See Com Ed Pet. 1-2, 8, 23-24. This Court's due process decisions make clear, however, that a statute's retroactive reach is less significant than the justification for imposing retroactive liability. Indeed, the Court has upheld the retroactive application of a statute that reached back much longer than the EPACT assessments. In *Turner Elkhorn*, the Court upheld the retroactive application of the black lung benefit program, which, for benefit claims filed after July 1, 1973,

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furnished the unenriched uranium to DOE for processing and then received the enriched uranium afterwards. See Com Ed Pet. 2. The enrichment services were plainly performed with the intent that the utilities would receive the enriched uranium, even if DOE held technical title to the uranium during the enrichment process. Com Ed also argues (*id.* at 21 n.17) that recent cases have rejected CERCLA liability for "mere purchases of products." However, the case cited by Com Ed for that proposition, *Concrete Sales & Servs., Inc.* v. *Blue Bird Body Co.*, 211 F.3d 1333 (11th Cir. 2000), is quite different from this case. In that case, the purchaser of services (electroplating services) furnished and received a product that was not, either before or after the electroplating, a hazardous substance. See *id.* at 1339. This case, however, involves processing of uranium, which is the quintessential ultrahazardous substance. See SMUD Pet. App. 62a. In any event, our point is not that EPACT follows every aspect of CERCLA liability, but rather that CERCLA's provision for arranger liability for processing of hazardous substances put nuclear utilities on notice that they could be required to contribute to the costs of remedying contamination caused by enrichment services that they had ordered.

made mine operators responsible for miners' black-lung benefits regardless of the date the miner left employment, see 428 U.S. at 8-10—and indeed, benefits had been awarded to miners who had left mine work as much as 50 years earlier. See *id.* at 40 n.4 (Powell, J., concurring in part and concurring in the judgment in part). Similarly, CERCLA has an unlimited retrospective reach, but no court of appeals has invalidated that statute on retroactivity grounds. See *United States* v. *Monsanto Co.*, 858 F.2d 160, 173-174 (4th Cir. 1988), cert. denied, 490 U.S. 1106 (1989).

Rather than cut off the retroactive effect of EPACT at an arbitrary date, Congress determined that each nuclear utility's liability for the special assessments should be proportionate to the amount of enriched uranium it had actually received and retained. That approach was a fair and rational means of allocating the utilities' responsibility to contribute to decontamination costs, by which each utility's liability is correlated to the extent that it derived a benefit from the enrichment services that caused the contamination problem. The utilities are assessed only for decontamination and decommissioning costs related to the uranium enrichment program, from which they benefited, in direct proportion to their use of enrichment services. They are not assessed for unrelated costs, such as the cost of remedying general pollution.[11] Moreover, contrary to petitioners' assertion that

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[11] Petitioners argue (Com Ed Pet. 4, 17-18, 27 n.20) that Congress improperly required them to contribute to the cost of cleaning up thorium and uranium processing sites unrelated to the uranium enrichment services that they purchased from DOE. That contention is incorrect. The overall statutory scheme makes clear that Congress intended petitioners' contributions to the Fund to be applied only to cleaning up DOE's uranium enrichment facilities. EPACT provides that the utilities' special assessments were intended for "decontamination and decommissioning of the Department's gaseous diffusion [uranium] enrichment facilities," see 42 U.S.C. 2297g-1(g) (referring to utilities' right to pass-through to con-

EPACT's retroactive assessments are inconsistent with *Eastern Enterprises*, the plurality opinion in that case expressed no doubt that receipt of a benefit is a rational basis for the imposition of retroactive liability to address a societal problem associated with that benefit. See 524 U.S. at 536 (opinion of O'Connor, J.) (noting that Congress could legitimately have made miners' former employers liable for the miners' employment-related health-care costs, given that employers benefited from miners' labor; citing *Turner Elkhorn*).

c. At bottom, petitioners' substantive due process challenge to the EPACT assessments can be reduced to their contention that, because the DOE enrichment plants were already contaminated from prior military uses before the government began offering commercial enrichment services, the government must bear all the cost of remediation—even though petitioners also concede that enriching the utilities' uranium caused the same kind of contamination as did enrichment for military purposes (or would have caused the same kind of contamination, had the facilities not already been contaminated). See SMUD Pet. 22a & n.2. That argument is unavailing.

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sumers "[a]ny special assessment levied under this section * * * for decontamination and decommissioning"), and the subchapter of EPACT containing the special-assessment provision also defined the term "decontamination and decommissioning" to mean activities "undertaken to decontaminate and decommission inactive uranium enrichment facilities." See EPACT § 901, 106 Stat. 2923 (adding 42 U.S.C. 2297(6) (1994), repealed by Act of Apr. 26, 1996, Pub. L. No. 104-134, Tit. III, ch. 1, subch. A, § 3116(a)(1), 110 Stat. 1321-349). Although the Fund established by EPACT is also the source of monies used to clean up thorium and uranium processing sites, see 42 U.S.C. 2296a-2(b), the monies for cleaning up thorium and uranium processing sites are to be drawn from the government's contributions to the Fund, see 42 U.S.C. 2296a-1; 42 U.S.C. 2296a-2 (1994 & Supp. V 1999), and the utilities have not been assessed for that purpose.

Nothing in the Due Process Clause required Congress to assign financial responsibility for clean-up costs only to the *first* user whose services contributed to the contamination of an enrichment facility, when all subsequent users of the facility received the same services that cause that kind of contamination. Congress could perhaps have adopted a rule that the first user of DOE's enrichment services should pay for the entire cost of decontamination, but it determined instead that the costs should be borne collectively by all of those entities whose uses of the enrichment services would have contributed to the contamination of the enrichment facilities, in proportion to the benefit the entity received from those enrichment services. "It is surely proper for Congress to legislate retrospectively to ensure that costs of a program are borne by the *entire class* of persons that Congress rationally believes should bear them." *Sperry*, 493 U.S. at 65 (emphasis added).

Indeed, petitioners are arguably required to pay considerably less than their fair share of the decontamination costs, for responsibility for 68 percent of those costs is assigned by EPACT to the government. As the court of appeals noted, "these utilities are obligated to pay only about a third of the remediation costs, even though evidence was presented [to Congress] that the 'production from these plants ha[d] been divided almost evenly between the government and commercial sectors.'" SMUD Pet. App. 49a (quoting H.R. Rep. No. 474, *supra*, Pt. 1, at 144).[12]

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[12] Petitioner MYAP argues (MYAP Pet. 25 n.17) that the government has not in fact contributed its allocated share to EPACT, since annual appropriations to the Fund in some years have been somewhat less than the amounts authorized by EPACT. In fact, we have been informed by DOE that the government's total contributions to the Fund through Fiscal Year 2001 amount to approximately $2.684 billion, whereas amounts contributed by the utilities pursuant to the EPACT assessments amount to approximately $1.482 billion. Thus, the government has contributed

Where the cost allocation scheme chosen by Congress is rational, courts are not empowered to engage in an evidentiary fact-finding inquiry, as demanded by petitioners, to determine whether the allocation of costs should or could be different. Whether some other approach would have been wiser is not a question of constitutional dimension, but is rather a policy question for Congress, not the courts. See *Turner Elkhorn*, 428 U.S. at 19 ("It is enough to say that the Act approaches the problem of cost spreading rationally; whether a broader cost-spreading scheme would have been wiser or more practical under the circumstances is not a question of constitutional dimension.").

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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considerably more than half of the amount in the Fund, even though Congress understood that about half of DOE's enrichment services were attributable to the commercial sector.

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IN THE

Supreme Court of the United States

OMAHA PUBLIC POWER DISTRICT,
Petitioner,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Federal Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

The Petition for Certiorari established that this case presents an ideal vehicle to resolve the disarray in the lower courts over the government's sovereign defenses to contract claims. As the Federal Circuit Bar Association has confirmed (Br. 12), the decision below in particular "leaves tremendous uncertainty in its wake about the applicability of the sovereign acts and unmistakability doctrines." The Brief in Opposition ("BIO") makes no attempt to dispute that point, but rather relies principally on an argument that neither the Federal Circuit nor any other court has accepted – that the government is immune from breach of contract liability whenever it has received or delivered the contracted-for goods or services. That position, if accepted, would work a sea change in the law that would be profoundly destructive of private parties' faith in the government as a contracting partner.

The Solicitor General also notably does not dispute that, given the Federal Circuit's exclusive jurisdiction, the test announced below will govern innumerable federal contract claims. It therefore bears emphasis that the decision below effectively holds Congress free to abrogate risk-shifting covenants with respect to any government contract. The only arguable limitation on this decision – that the legislation must apply to a *de minimis* number of parties that did not contract directly with the government – is no limit at all, for "[l]egislation can almost always be written in a formally general way, and the want of an identified target is not much security when a measure's impact nonetheless falls substantially upon the Government's contracting partners" (*United States* v. *Winstar Corp.*, 518 U.S. 839, 902-03 (1996) (plurality)). The decision below thus squarely calls into question "the myriad procurement and service contracts the United States must enter into with private enterprise." Fed. Cir. Bar *Amicus* Br. 2.

To ensure that the Federal Circuit's interpretation of the government's sovereign defenses to contract claims receives full consideration, certiorari should be granted limited to Question One and the case set for argument in tandem with No. 01-1411,

Commonwealth Edison Co. v. *United States*. The two cases together provide the Court with the opportunity to consider, in a comprehensive fashion, all of the questions raised with respect to the legality of the EPACT special assessments.

I. There Is No Merit To The Government's Argument That Petitioner's Suit Is Barred Because The Enrichment Contracts Have Been Performed.

The Solicitor General places exceptional weight (at 10-12) on a suggestion in a footnote in the panel opinion in *Yankee Atomic Electric Co.* v. *United States*, 112 F.3d 1569, 1572 n.2 (CAFC 1997), *cert. denied*, 524 U.S. 951 (1998), that the utilities may not assert a claim for "breach" of the enrichment contracts because "[t]ypically" a suit for breach is brought "while the contract is being performed, whereas the contracts in the present case have been fully performed." No court has adopted the Solicitor General's position. The majority in *Yankee Atomic* itself concluded that this admittedly "[t]echnical[]" "distinction does not affect our decision" (*id.*), while the *en banc* Federal Circuit placed no weight on the distinction in *Commonwealth Edison*, holding instead that the utilities' claims were barred by the sovereign acts and unmistakability doctrines (see Pet. App. 60a-61a). And neither of the other cases cited by the government – *John J. Kirlin, Inc.* v. *United States*, 827 F.2d 1538, 1541 (CAFC 1987), and *Mulholland* v. *United States*, 361 F.2d 237, 239-40 (Ct. Cl. 1966) – stands for a remotely relevant proposition.[1] That is not

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[1] The Solicitor General's suggestion (at 11) that certiorari should be denied because this Court declined to review *Yankee Atomic* is also meritless. *Yankee Atomic* was one of its earliest applications of this Court's 1996 ruling in *Winstar*; in the intervening five years, the issues raised by *Winstar* have percolated substantially in the lower courts. Moreover, as the Solicitor General emphasized in opposing certiorari in *Yankee Atomic* (at 11), that case was functionally interlocutory because the utilities' constitutional claims had not yet been addressed. All contract and constitutional issues arising from EPACT have been finally decided in the lower courts and are ripe for consideration by this Court.

surprising because the Solicitor General's contention is legally erroneous for two independent reasons.

1. The Solicitor General's premise – that the contracts at issue in this case "have already been fully performed" because "the contractual relations between the utilities and the government terminated before these actions were brought" (BIO 14) – is wrong. Petitioner's suit alleges a breach of two *separate* promises by the government in the enrichment contracts.

First, the government promised to charge a fixed price for its enrichment services. EPACT amounts to a straightforward repudiation of that promise.

Second, petitioner seeks to enforce the government's promise, intrinsic to the fixed-price enrichment contracts, to assume the risk that the prices it charged to the utilities would not cover its costs. See Pet. 13-14 (citing *Spearin* v. *United States*, 248 U.S. 132, 136 (1918)). The Solicitor General seemingly acknowledges that the government continues to bear this contractual obligation with respect to the "one outstanding contract between DOE and Commonwealth Edison." BIO 11. But his assumption that the government's obligation conveniently expired as soon as it delivered the uranium on the other contracts is contrary to the parties' manifest expectations. Plainly, the utilities bargained for a promise that the government would not shift unexpected costs to them – whether before, during, or after the delivery of the uranium. The enrichment contracts thus have *not* "already been fully performed" (contra *id.*).[2]

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[2] An example illustrates the point. Assume that, as part of an ongoing business relationship, one private party agrees to sell 200 widgets to another private party at a fixed price of $200. A year after the exchange of goods for money, the seller discovers that its costs were $100 higher than anticipated and covers the overrun by withholding that amount from its ongoing accounts owed to the purchaser. According to the Solicitor General (at 11), the widgets contract has "already been fully performed" at this point, stripping the purchaser of any right to sue for breach of contract. That is absurd: the fixed-price contract imposes on the seller the risk of cost overruns, before, during and after delivery of the goods.

Perhaps the best illustration of the fallacy of the Solicitor General's position is *Winstar* itself. In that case (like this one), at the time of the suit, the government had already conveyed property (title to failing thrifts) in exchange for agreed purchase prices. The contracts nonetheless imposed a further, *ongoing* obligation on the government, whether characterized as an obligation to immunize the thrifts in the event of regulatory change (by the plurality) or instead not to engage in regulatory change (by Justice Scalia). No member of this Court doubted that such an ongoing obligation was a part of the contract or that it could be enforced so long as the sovereign acts and unmistakability doctrines were satisfied. The same principle governs this case: the utilities can invoke the enrichment contracts to enforce the government's ongoing contractual obligation to assume the risk that it would later discover that its costs were higher than anticipated.

2. Even assuming that the contracts in this case *have* been fully performed, there is no merit to the Solicitor General's contention that petitioner's suit is barred. Although the *Yankee Atomic* majority was correct to state that breach of contract suits "[t]ypically" arise during performance (112 F.3d at 1572 n.2), that is true only because most contracts are between private parties that lack the power to enforce their breaches by enacting legislation. A suit like this one could never arise from a purely private contract because a private supplier (unlike the federal government) obviously could not force utilities to pay $2.25 billion in retroactive assessments. The utilities, in turn, would never have cause to sue for "breach" to recoup such assessments. Rather than bringing suit, the utilities would *defend* against the private supplier's demand for payment by asserting that the parties' obligations were set by the contracts.

Indeed, that is essentially what has happened in this case. Rather than merely seeking damages for "breach of contract," petitioner also asserts that the enrichment contracts preclude the government from collecting the EPACT assessment in the first instance. There cannot be any dispute that a government contractor can, even after performance, invoke the contract to bar actions by the government in derogation of its contractual

promises. See *Wood* v. *Lovett*, 313 U.S. 362, 370 (1941) (state cannot grant a contractual right and substantially alter that right subsequently through legislation without impairing the obligation of contract); see also *Green* v. *Biddle*, 21 U.S. 1, 92 (1823) ("the [Contracts Clause of] the Constitution of the United States embraces all contracts, executed or executory"). Thus, if the government delivered enriched uranium under the contracts but six months later ordered petitioner to return it, plainly petitioner could properly assert that the government's order "breached" the contract, notwithstanding that the parties had already "fully performed."

The Solicitor General's contrary position that no breach of contract action will lie in these circumstances would produce ridiculous results and would contradict basic principles of government contracting by permitting the government to await delivery of a good or service and then unilaterally change the price. In this very case, the utilities purchased enriched uranium at the government's contractually specified price only to face, decades later, a government demand for additional monies based upon the same purchases. Such an extraordinary result would be antithetical to this Court's repeated admonition that "[w]hen the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals" (*Mobil Oil Exploration & Producing S.E., Inc.* v. *United States*, 530 U.S. 604, 607 (2000)). Indeed, holding the government immune from liability for breach of contract arising from retroactive repudiation would render the government's contractual promises illusory. As this Court has long noted, a promise to charge a fixed price, "'with a reserved right to deny or change the effect of the promise, is an absurdity.'" *Winstar*, 518 U.S. at 913 (Breyer, J., concurring) (quoting *Murray* v. *Charleston*, 96 U.S. 432, 445 (1878)).[3]

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[3] The Solicitor General's position is also untenable because it would render a breach of contract claim unavailable even if the private parties secured an "unmistakable" promise protecting them from the government's breach. See BIO 15 (asserting that post-performance

(footnote continues)

There is accordingly no merit to the Solicitor General's assertion that the government's sovereign defenses to contract claims are irrelevant in this case because petitioner is barred from enforcing its rights under the enrichment contracts.

II. Certiorari Is Warranted With Respect To The Federal Circuit's Articulation And Application Of The Government's Sovereign Defenses To Contract Claims.

The *en banc* Federal Circuit held that the utilities may prevail on their contract claims only by satisfying the sovereign acts and unmistakability doctrines, notwithstanding the fact that the utilities' claims do not rely on a supposed promise by the government not to invoke its sovereign authority. As the Petition demonstrated (at 11-17), that holding squarely conflicts with this Court's precedents. For example, these defenses were relevant in *Winstar* because a majority of the Court construed the plaintiff bank's complaint as asserting that the government promised not to engage in certain sovereign regulation. See *id.* at 920 (Scalia, J., concurring); see *id.* at 934-35 (Rehnquist, C.J., dissenting). Similarly, in *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 136 (1982), the plaintiff alleged that an Indian tribe had promised not to exercise its sovereign authority to "tax." See also Pet. 12 (collecting cases). Petitioner, by contrast, seeks to enforce only the government's promises to charge a certain price and to assume the risks of unexpected costs, neither of which involves a supposed withdrawal of sovereign authority.

1. The Solicitor General nonetheless maintains that "[t]he EPACT special assessment legislation is a 'sovereign act.'" BIO 12. In support, he points to a single characteristic of the statutory scheme: because of a pass-through provision, "[t]he assessments fall on the utilities that actually used the enriched uranium." *Id.* This provision, according to the government (*id.*), establishes as a matter of law that "EPACT cannot be viewed as a retroactive price increase" but rather is "legislation

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contract claims must be dismissed "without recourse" to unmistakability or sovereign acts doctrines).

designed to spread the costs of decontamination and decommissioning among the utilities that benefited" from the government's enrichment services.

Preliminarily, the government's argument merely restates the Federal Circuit's decision on the merits and fails to address the important bases for this Court to grant certiorari to address the court of appeals' articulation and application of the sovereign acts doctrine. This case presents an ideal opportunity for the Court to explicate the "public and general act" standard announced in *Horowitz* v. *United States*, 267 U.S. 458, 461 (1925), which remains muddled after *Winstar*. Among other things, it is undisputed that the Federal Circuit's test assigns no weight to the fact that Congress' adoption of the EPACT assessment was driven by the government's self-interested goal of profiting from its sale of USEC. See Pet. 14. Thus, even assuming that EPACT "is designed to spread the costs" of the assessments (BIO 12), the relevant fact is that the statute was designed to concentrate the profits in the U.S. Treasury. Three Justices in *Winstar* deemed this an important factor in the "sovereign acts" analysis, while the other Members of the Court (with the exception of the Chief Justice) did not reach that issue. The Solicitor General does not dispute that this case presents an ideal vehicle for the full Court to decide the question. See generally Pet. 19-21.

Of note, even without regard to the government's self-interest, EPACT does not satisfy the sovereign acts doctrine as articulated by the various opinions in *Winstar*. That is presumably why the BIO fails even to *cite* to the *Winstar* decision in discussing that doctrine. See BIO 12. The *Winstar* plurality would deem the sovereign acts doctrine inapplicable here because "a substantial part of the impact of the Government's action * * * falls on its own contractual obligations" (518 U.S. at 898). The Solicitor General does not dispute that the legislation was designed to target a discrete group of the government's "commercial customers" (Pet. 15) or that at least *eighty-five percent* of the assessments are based on direct contracts with the government (*id.* 20). Moreover, the assessments are not, as the Solicitor General suggests (at 17), a

mere "regulatory change" incidentally affecting the utilities' contracts. Rather, the assessments admittedly are an exaction of additional funds – over and above those paid under the fixed-price enrichment contracts. See Pet. 15. From the outset, the legislation was designed to "abrogate the essential bargain of the contracts at issue" and therefore constituted an "impermissible repudiation" that the sovereign acts doctrine does not excuse. *Winstar*, 518 U.S. at 924 (Scalia, J., concurring).

Justice Scalia's concurrence deemed the sovereign acts doctrine essentially co-extensive with the unmistakability doctrine (see 518 U.S. at 923-24), which (on his view) embodies a presumption that, because "[g]overnments do not ordinarily agree to curtail their sovereign or legislative powers," "the sovereign does not promise that none of its multifarious sovereign acts, needful for the public good, will not incidentally disable it or the other party from performing one of the promised acts" (*id.* at 921). Justice Scalia concluded that the doctrine was triggered in *Winstar* because the plaintiffs invoked a promise by the government not to regulate them in a certain fashion and furthermore claimed that a sovereign act (FIRREA) made it impossible for the government to fulfill that promise. See *id.* at 923-24. EPACT, by contrast, does not satisfy *either* element of Justice Scalia's formulation because: (i) petitioner relies only on a promise to assume the risk of cost overruns, as opposed to a promise not to engage in sovereign regulation; and (ii) nothing in EPACT "disables" the government from fulfilling each and every promise it made in the enrichment contracts.

Notably, the government does not deny the square conflict between the *en banc* Federal Circuit's articulation of the test governing the sovereign acts doctrine and decisions of the Ninth and Tenth Circuits. As demonstrated in the Petition, those courts hold that the sovereign acts doctrine is inapplicable to measures that, like EPACT, are "targeted" at "relieving the government" from particular contractual obligations (*Kimberly Assocs.* v. *United States*, 261 F.3d 864, 870 (CA9 2001)) and that are not "of general applicability for the general welfare" (*RTC* v. *FSLIC*, 25 F.3d 1493, 1501 (CA10 1994)). The

Solicitor General does not dispute that EPACT fails this more stringent standard.

The Solicitor General's only answer is to suggest (BIO 11) that the conflict is not presented because the Ninth and Tenth Circuits would not apply the sovereign acts doctrine in this case. That is so, he maintains, because those courts limit the doctrine to cases involving the government's failure "'to perform contractual obligations'" (quoting *RTC* v. *FSLIC*, 25 F.3d 1493, 1501 (CA10 1994)), while in this case "DOE has already performed its obligations to provide enrichment services." The previous section fully answered this argument: the government has repudiated the price element of the contract and breached its ongoing obligation to bear responsibility for unforeseen costs, and neither precedent nor logic suggests that the government is free from liability on a contract once it delivers or receives the contracted-for goods or services. See *supra* at 4 n.2. As such, the Ninth and Tenth Circuits would not hesitate to reject the government's "sovereign acts" defense in this case. Certiorari should be granted to resolve the conflict.

2. The Solicitor General (BIO 12-13) makes almost no attempt to defend the Federal Circuit's holding on the unmistakability doctrine, offering only three sentences of discussion. And here too, the government does not seriously dispute *any* of the substantial grounds for granting certiorari. The Petition explained (at 18-19) that no majority of the Court in *Winstar* articulated a standard to govern the doctrine's application, particularly in the frequently recurring circumstance of the government's alleged breach of basic contract terms, including terms allocating the risk of cost overruns. The resulting uncertainty has engendered pleas by the Court of Federal Claims and other courts for this Court to provide further clarification. *E.g.*, *Adams* v. *United States*, 42 Fed. Cl. 463, 482 (1998).

Ignoring those points, the government maintains (BIO 12-13) that the utilities must overcome "the unmistakability doctrine in its strongest form" because they "seek damages" in the amount of the EPACT assessments and thus "effectively seek an exemption from, or an injunction against, the operation

of EPACT as applied to them." But the unmistakability doctrine plainly does not apply to the EPACT assessment under the disparate tests formulated in *Winstar*. As noted *supra*, Justice Scalia's concurrence limits the doctrine to circumstances (not presented here) in which (i) the plaintiff relies on a supposed governmental promise not to exercise its sovereign power, and (ii) a sovereign act makes the government's performance impossible. For its part, the *Winstar* plurality concluded that the doctrine turns on whether the plaintiff relies on a contractual promise that could "be recognized without effectively limiting sovereign authority" and thus would not "require exercise * * * of a power peculiar to the Government." 518 U.S. at 880. The plurality contrasted a promise to grant "a tax exemption" (which would "block the exercise of the taxing power") with a promise "to buy food for the army" (under which "no sovereign power is limited"). *Id.* Thus, "no one would seriously contend that enforcement of humdrum supply contracts might be subject to the unmistakability doctrine." *Id.* Here, petitioner relies only on a promise routinely made by the government in numerous contracts to assume the risk that the costs of performance would be more than anticipated.

The Petition for Certiorari accordingly squarely presents this Court with the opportunity to resolve the substantial uncertainty surrounding the sovereign acts and unmistakability doctrines in the wake of *Winstar*, as well as to address the Federal Circuit's marked departure from this Court's precedents in holding that those doctrines bar petitioner's attempts to enforce its contractual rights.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Petition, certiorari should be granted limited to Question One and the case set for argument in tandem with No. 01-1411, *Commonwealth Edison Co.* v. *United States*.

Respectfully submitted,

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